IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1397

JOSEPH JUDICE, individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, Jr., individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

against

HARRY VAIL, Jr., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AND TO PRESENT ORAL ARGUMENT AS AMICUS CURIAE AND THE BRIEF OF AMICUS CURIAE

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Pursuant to Rule 42 and Rule 44(7) of the Rules of the Supreme Court, the New York State Consumer Protection Board (hereinafter, Board) respectfully moves this court for leave to file the accompanying brief in this case as *amicus curiae* and for an opportunity to present oral argument. The consent of the attorney for the appellees herein has been obtained, but the attorney for the appellants herein refuses to consent to the filing of the brief by the Board as *amicus curiae.*

The New York State Consumer Protection Board, part of the Executive Department of the State of New York, is mandated to coordinate and perform a wide range of consumer protection functions for the consumers of the State of New York. The Board has the power and duty, *inter alia*, to conduct investigations, research, studies and analyses of matters affecting the interests of consumers; to represent the interest of consumers of the state before federal, state and local administrative and regulatory agencies; to study the operation of consumer protection laws and recommend to the Governor new laws and amendments of laws for consumer protection. (N.Y. Exec.L. § 553) Pursuant to its additional responsibility of cooperating with and assisting consumers in class actions in proper cases, the Board believes this case raises constitutional issues of great importance to the consumers of the State of New York. Class action jurisdiction has been established by the District Court in this action. (J.S. 17a).

The Board offers a perspective which is not available from the parties to this action. Since 1970, when created by the Legislature, the Board has developed considerable expertise in the area of consumer credit and the problems flowing from it. The Board has drafted comprehensive legislation to modify a number of laws regulating credit in New York State, testified at legislative hearings on credit problems, and produced several pamphlets and movies on the subject.

The Board believes the constitutionality of the supplementary procedure must be reviewed with a full understanding of debt collection procedures in New York State. The impact of the challenged contempt procedure is broad and serious in that debtors entangled in the process can be incarcerated without adequate notice, actual hearing, right to counsel, and be subjected to punitive fines. Furthermore, the debtor becomes implicated in a process which ultimately leads to contempt prior to the initiation of the supplementary proceedings by the creditor. The process really

begins when the creditor commences extrajudicial efforts to collect the debt. This entire mechanism for collection of debts needs to be discussed to fully comprehend the impact and constitutional deficiencies of the challenged contempt process.

The Board is in a unique position to draw from its practical experiences and expertise and to provide this Court background to the issues in this case and to suggest practical solutions to the constitutional defects in the contempt process. We, therefore, submit that the Board has a significant interest in the case before this Court, and experience with the issues in this case which enable it to present a brief *amicus curiae* and oral argument which will aid the Court in its deliberations.

Respectfully submitted,

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30 September 1976

Summary of Argument

New York State's contempt process authorizes the incarceration of a judgment debtor for not appearing in response to an information subpoena or subpoena to appear for examination as to assets. (N.Y. JUDICIARY LAW Sections 756, 757, 770, 772, 773, 774 and 775). The procedure under N.Y. JUDICIARY LAW Section 757(1) authorizes issuance of an order to show cause in contempt cases. If a debtor does not appear in response to the order to show cause, he may be committed to jail without further opportunity to appear before the court.

The New York contempt procedure violates the Due Process Clause of the Fourteenth Amendment on four grounds: the subpoenas and the order to show cause do not provide adequate notice of the potential fine and imprisonment; the person accused of contempt may be committed to jail for as long as 90 days without ever being physically present at a hearing; the person incarcerated for contempt is not informed of his right to counsel and when indigent is not assigned counsel; and the sanctions imposed under the challenged statutes are punitive.

The New York State Consumer Protection Board relies on the arguments in appellees' brief to demonstrate the unconstitutionality of the cited provisions of the JUDICIARY LAW but contends that the requirements of due process must be judged against the entire background and context for the use of the contempt process in appellees' state court cases. This brief is designed, among other purposes, to provide such background and context. A debtor entangles himself or herself in the complicated collection process as soon as default under a credit agreement takes place. Assessment of the procedural protections required depends upon a full understanding of the entire mechanism for collection of a debt.

The Court should consider the entire process for collection of a debt beginning with the panoply of extrajudicial collection practices, many abusive, confusing and illegal. The collection process continues through service of an obtuse summons; the entry of a default judgment in most consumer credit actions, often without the knowledge of the debtor and about which the debtor is never informed, and concludes with supplementary proceedings to collect the judgment which at times includes use of the challenged contempt process.

The debtor's confusion and mistakes which often create the opportunity for accusing him or her of contempt of

court are related to the same factors which lead to default judgments.

With this background, the inescapable conclusion crystallizes that the Due Process Clause mandates substantial procedural protections prior to incarceration and deprivation of liberty of a judgment debtor.

It is feasible to provide clear notice of potential fine and imprisonment, to bring the debtor physically before the court after apprehension and before commitment to jail, and to assign an indigent debtor counsel before committing him to prison.

I. The constitutionality of the contempt process must be considered in the context of the total scheme for collection of debts

The lower court in this case held seven sections of N. Y. Judiciary Law Article 19 which governs Contempts in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[1]

The constitutionality of the contempt procedures challenged in this case must be reviewed with a full understanding of the total scheme for collection of debts, once a default takes place.

> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1971).

The New York State Consumer Protection Board submits that the degree of procedural safeguards required in

[1] *Vail* v. *Quinlan*, 406 F. Supp. 951 (1976).

this case depends on the entire circumstances of the case including the background described in this brief. The supplementary proceeding challenged in the case before the Court involves the last judicial step to collect a debt, the use of contempt and incarceration. However, the procedures for collection start when the debtor defaults. Regardless of the circumstances or defenses of the debtor, he or she is usually subjected to a barrage of confusing and intimidating notices, letters, telephone calls, personal visits and legal notices and documents[2] which continue without interruption to the day the creditor considers the debt worthless or the debtor either pays or finds himself or herself incarcerated in effect for the failure to respond to the "last" notice, the order to show cause.

The case before the Court is not simply a situation where the debtor did not respond to a subpoena issued by the creditor's attorney and an order to show cause issued by the state supreme court in New York. Instead, the case brings before the Court the total scheme for collection of debts which begins with extrajudicial collection practices and continues with the service of a summons and complaint, the entering of a default judgment, and finally, the enforcement of the default judgment. Many debtors find themselves caught in this complex and lengthy procedure to collect a debt, even though the debtor may have defenses and relevant and compelling mitigating circumstances.

The purpose of this brief is to demonstrate that many debtors find themselves in default for reasons beyond their control and just do not know how to extricate themselves

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[2] D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 177-183 (1974) (hereinafter CONSUMERS IN TROUBLE); R. NEEDHAM AND L. POLLOCK, COLLECTING CLAIMS AND ENFORCING JUDGMENTS 59-65 (1969) (hereinafter NEEDHAM AND POLLOCK); A. RUBIN JR., FUNDAMENTALS OF THE COMMERCIAL PRACTICE 45-54 (1965).

from the procedural quagmire. The New York State Consumer Protection Board urges the Court to affirm the District Court and to insure the appellees adequate procedural protection during supplementary proceedings for the collection of money judgments prior to the debtor's deprivation of liberty and incarceration.

II. The extension of credit and the prejudgment collection process are an essential part of the context which the Court should consider

A. Creditors Persuade Consumers To Buy Now, Pay Later By Enticing Consumers With "Easy Credit"

Consumer credit has grown astronomically over the past twenty-five years. Total installment credit outstanding in the United States has increased from $14.7 billion[3] in 1950 to $162.2 billion in April of 1976 (1100 percent).[4] In comparison, between 1950 and the first quarter of 1976 both GNP and personal income increased by less than 600 percent.[5]

Consumer credit has become an integral part of this country's economy and has been a significant factor in raising the general standard of living by allowing consumers to make purchases based on future earning power. Unfortunately, some consumers, enticed by offers of "easy" credit, find themselves burdened with monthly payments and mounting interest charges which exceed a level that their future income can support.

> "Through mass media, Americans in *all* walks of life are bombarded with messages to buy now and pay

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[3] STATISTICAL ABSTRACT OF THE UNITED STATES 1975 475 (1975) (herinafter STATISTICAL ABSTRACT).

[4] FED. RESERVE BULL. A 46 (June 1976).

[5] STATISTICAL ABSTRACT, *supra* note 3 at 380, 386; 56 SURVEY OF CURRENT BUSINESS 3, 7 (U. S. Dept. of Commerce No. 5 1976).

later. 'Easy payments' and 'no money down' are slogans luring even the poor into the marketplace, and in spite of the low credit status of the poor there are numerous merchants who are prepared to extend them credit. Nor is it very difficult to lure the poor into making costly purchases, for in some ways ownership of goods takes on even more significance for low-income persons than for those in higher income brackets. Since the poor have little prospect of greatly improving their low social standing through occupational mobility, they are apt to turn to consumption as at least one sphere in which they can make some progress toward the American dream of success."[6]

Credit suppliers often "sell" credit to consumers as if it were a commodity unto itself rather than a means of purchasing goods and services.

"A recent issue of *American Banker,* a trade newspaper, told how a chain of banks planned to increase the value of its installment loans outstanding by 15% in 90 days. The approach was comprehensive, a quarter of a million dollars for an advertising blitz via radio, TV, newspapers, direct mail, envelope stuffers, telephone solicitations, and cash rewards to bank employees for each loan they personally produced. The campaign theme was blunt and direct: 'We've got $25,000,000 to loan. Get yours.'"[7]

The grantors of credit are motivated to expand the credit market by the profits to be earned from the extension of credit. The lending of money has become a lucrative business. In some cases, "the low income buyer is extended

[6] Caplovitz, *Consumer Credit in the Affluent Society,* 33 LAW & CONTEMP. PROB. 641, 647 (1968).

[7] *Don't Let The Credit Pushers Trap You,* CHANGING TIMES 16 (April 1976).

credit, without regard to other demands on his income, because it is profitable for the creditor to do so, even though the calculated proportion of default may be high.'"[8]

All too frequently credit is extended to consumers imprudently and haphazardly without regard for need, desire or propriety. During the bank credit card boom of the 1960's, unsolicited cards were mailed first to bank customers, including thousands of children; then, as competition grew, to all taxpayers; then to all registered voters; and finally to everyone in the phone book.[9] Finally, Congress made it illegal to mail unsolicited credit cards as of October, 1970.[10] As recently as April of this year however, the New York State Attorney General received complaints that Britts Department Store, a nationwide chain, had sent credit cards to consumers who neither applied for nor requested cards and did not want them. The cards had been sent solely on the basis of a telephone solicitation in which consumers were not directly asked whether or not they desired a credit card.[11]

Obtaining a charge account can be as easy as filling out an application—even having an income is not necessarily a prerequisite, as was proven by a Troy, Michigan, man. He filled out a completely honest application for his pet dog—listing her age as 2.7 years (mistaken by the store as an "ideal" 27), leaving the question about social security number and income blank, and giving her occupation as "watchdog". The store promptly issued

[8] Note, *Sewer Service and Confessed Judgments: New Protection For Low-Income Consumers,* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 414, 414 n.3 (1971) (hereinafter *Sewer Service*).

[9] A. GRIFFIN, THE CREDIT JUNGLE 21 (1971) (hereinafter THE CREDIT JUNGLE).

[10] Consumer Credit Protection Act, 15 U.S.C.A. § 1642 (1970). See also N.Y. GEN. BUS. LAW § 515 (McKinney Supp. 1975); THE CREDIT JUNGLE, *supra,* note 9 at 33.

[11] *Unrequested Credit Cards Rapped,* Syracuse Post Standard, April 26, 1976, at 2, col. 1.

a valid credit card, entitling her to all charge account privileges.[12]

A June, 1974, survey of nine lending institutions in the Albany, New York, area—six loan companies and three banks—found loan counselors generally quick to give credit rather than sound financial advice on how to live within one's means.[13]

B. Most Default Debtors Are Not Irresponsible And Do Not Disregard Their Legal Responsibilities

The underlying question which permeates all defaults in consumer credit transactions is why did the debtor stop making payments. Many creditors characterize default debtors as "deadbeats" and "skips", people who ignore their legal responsibilities and lie and cheat to achieve this end.[14] This archaic assumption about default debtors tends to tarnish and bias any objective analysis of a consumer credit transaction and the reasons for any default thereunder.

David Caplovitz, a professor at the Graduate School and University Center of the City University of New York, specifically addressed this critical question—why do debtors default?—in an extensive study, CONSUMERS IN TROUBLE, A STUDY OF DEBTORS IN DEFAULT (hereafter CONSUMERS IN TROUBLE).[15]

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[12] THE CREDIT JUNGLE, *supra*, note 9 at 52.

[13] Basler and Basler, *Credit Too Quick by Some Local Loaners?*, Knickerbocker News (Albany, New York), June 12, 1974, § B, at 1, col. 2.

[14] CONSUMERS IN TROUBLE, *supra*, note 2 at 9; S. SHERWIN, HOW TO COLLECT A MONEY JUDGMENT 11 (1975) (hereinafter SHERWIN); A. TANNRATH, HOW TO LOCATE SKIPS AND COLLECT 59 (1948).

[15] Professor Caplovitz and his staff interviewed in detail 1,333 default debtors. Sample is from court records in New York,

(footnote continued on following page)

Professor Caplovitz concluded that only five percent of the sample defaulted for reasons based on the debtor's irresponsibility[16] where the default stemmed primarily from unwillingness to pay, not inability to pay. Professor Caplovitz found that major cause for default, in 48 percent of the cases, was loss of income, resulting from such factors as adverse employment change, illness to chief wage earner and loss of secondary wage earner's income.[17] He further learned that 35 percent of the debtors gave reasons

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(footnote continued from preceding page)

Chicago, Detroit and Philadelphia. The survey was limited to transactions for merchandise and personal loans. See *Consumers in Trouble*, Appendix B for analysis of the methodology for the study and his solutions to possible bias and the results.

[16] The following table, extracted from Caplovitz's study, CONSUMERS IN TROUBLE, *supra* note 2 at 53, summarizes the findings of the study:

Table 4.1 / Major Categories of Reasons for Default (percent)

Debtor's mishaps and shortcomings	*first reason*	*second reason*	*third reason*	*total reasons*	*total individuals*
Loss of income	43	19	10	24	48
Voluntary overextension	13	23	32	17	25
Involuntary overextension	5	12	7	7	11
Marital instability	6	4	5	5	8
Debtor's third parties	8	4	6	6	9
Debtor irresponsibility	4	2	—	4	5
Creditor may be implicated					
Fraud, deception	14	13	15	14	19
Payment misunderstandings	7	3	—	6	8
Partial late payments	—	15	6	5	7
Item returned to creditor	*	6	14	2	4
Harassment by creditor	—	1	5	1	1
All other (miscellaneous)	1	—	—	*	*
Total percent	101	101	101	101	145
N	(1,320)	(570)	(110)	(2,000)	(1,326)

* Signifies less than ½ of a percent

[17] CONSUMERS IN TROUBLE, *supra*, note 2 at 57.

for their default which implicated the creditor in varying degrees.[18]

Professor Caplovitz states in his book that:

> "In almost four of five cases the primary reason for the default reflects upon the debtor; the creditor is implicated in more than 20 percent of the primary reasons. Almost all the primary reasons involving the creditor refer to either fraud or payment misunderstandings. The more dubious categories, such as accounts of partial payments and merchandise that reverted to the seller, rarely show up as primary reasons. Table 4.2 also shows that creditors are more likely to be implicated in secondary reasons than in primary ones. Many debtors admitted that they fell behind because of loss of income, but then added that they were also reluctant to pay because they felt that they had been cheated. Of all the reasons offered, about 27 percent fall into the categories in which the creditor is likely to be at least partly to blame. Finally, from the last column we learn that although four of every five debtors gave at least one reason for their default that reflects their own shortcomings, more than a third gave at least one reason that implicated the creditor as well.'"[19]

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[18] *Id.* at 91.

[19] *Id.* at 55.

Table 4.2 / Summary: Classification of Reasons by Locus of Blame (percent)

locus of blame	*first reason*	*second reason*	*third reason*	*total reasons*	*total individuals*
Debtor's mishaps and shortcomings	79	63	60	74	80
Creditors may be implicated	22	38	40	27	35
Total percent	101	101	100	101	115
N	(1,320)	(570)	(110)	(2,000)	(1,326)[a]

[a] These percentages are computed in the same way as in Table 4.1. Regardless of the number of debtor's mishaps categories that apply to a given person, the debtor is counted only once. The same is true for the creditor-related categories. As a result, these percentages total 115 percent rather than 145 percent as in Table 4.1.

Professor Caplovitz's findings on the reasons for default by debtors is supported by a more limited study by Professor H. Lee Matthews on the causes of personal bankruptcies.[20] He concluded that only 13 percent of the sample filed bankruptcy because of the debtor's irresponsibility, while 48 percent of the sample was forced into bankruptcy by catastrophic events.[21]

Though neither study tried to isolate differences between default debtors against whom judgments have been filed and debtors who file personal bankruptcies, the similarities in the findings of both studies further demonstrate that many and probably most debtors default for reasons other than disregard for his or her legal responsibilities.

For further discussion of the relationship between the incidence of default and bankruptcy, see Mitchell *Bankruptcies Up 40 Percent in Area,* Elmira Star Gazette, January 5, 1976 at 9.

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[20] Causes of Personal Bankruptcy, (1969) (hereinafter Causes of Personal Bankruptcy), Matthews' studied the filing of personal bankruptcies in the Eastern Division of the Southern District of Ohio in the first six months of 1964. Matthews' findings are contained on the following table:

Table 4.1—Distribution of Personal Bankrupts by Hypothesized Causes of Bankruptcy

Hypothesis	*No. of Cases*	*Percent of Total*
A significant change in the income of a consumer due to unemployment, seasonal employment, or personal injury	20	13
An involuntary assumption of debt due to catastrophic events such as:		
Medical expenses	28	18
Marital difficulties	39	26
Personal liability suits	6	4
Lack of prudent financial management leading to spending beyond the capacity to repay	40	26
An attitude system which consists in part of a lack of responsibility toward paying debts	19	13

Source: Data collected in interviews.
Id. at 53.

For further discussion of the relationship between the incidence of default and bankruptcy, see Mitchell *Bankruptcies Up 40 Percent in Area,* Elmira Star Gazette, January 5, 1976 at 9.

[21] Causes of Personal Bankruptcy, *supra* note 19 at 53.

C. Creditors Employ A Variety Of Extrajudicial Collection Practices To Procure Repayment Of A Debt In Default

As soon as the creditor entices the debtor to procure the credit, and succeeds in persuading the debtor to buy now and pay later, the creditor begins collecting the debt. Usually the contract for the debt includes the terms for repayment, such as an installment plan or lump sum arrangement. When the debtor defaults under the terms of the credit agreement for whatever reason, the creditor promptly initiates an organized, comprehensive and vigorous program for collection of the debt[22] by utilizing a wide range of extrajudicial collection techniques.[23]

The Code of Ethics and Operations of the American Collectors Association, Inc.[24] carefully details the ethical limitations applicable to efforts to collect a debt from a default debtor.[25]

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[22] For discussion of creditors' collection practices see works cited, *supra* note 2; also see A. 67a.

[23] FEDERAL TRADE COMMISSION, NEW YORK REGIONAL OFFICE STAFF REPORT ON DEBT COLLECTION HEARINGS (1973) (hereinafter, *Staff Report*); HEARINGS ON H.R. 11969 BEFORE THE SUBCOMMITTEE ON CONSUMER AFFAIRS OF THE HOUSE COMMITTEE ON BANKING, CURRENCY AND HOUSING, 94th Cong., 2nd Sess. (1976).

[24] AMERICAN COLLECTORS ASSOCIATION, INC., THE DIRECTORY OF THE AMERICAN COLLECTORS ASSOCIATION, INC. BONDED COLLECTORS 10 (1975).

[25] IN HIS RELATIONSHIP WITH CONSUMERS, EACH ACA MEMBER SHALL:

> Show due consideration for the misfortunes of consumers in debt and deal with them according to the merits of their individual cases.
>
> Do everything reasonable to assist the consumer in the solution of any financial problems he may have and to help him to have a better understanding of the use of credit and importance of using it wisely, by utilising appropriate channels of communication, including programs of consumer education.

(footnote continued on following page)

However, the division between these ethical guidelines and outright abusive conduct is both thin and difficult to define. Unfortunately, many collection practices teeter between the ethical and the abusive and eventually surface as abusive tactics designed to harass the debtor until payment is made.

The existence of these coercive tactics and their relatively frequent use has been widely recognized.[26]

(footnote continued from preceding page)

> *Avoid deceptive practices, statements, or materials which would cause the consumer to believe that he was dealing with someone other than the collector.*
>
> Provide effective channels for receiving and acting on consumer complaints and suggestions, including but not limited to utilizing the resources of its Association, Chamber of Commerce, Better Business Bureau, recognized consumer groups, and other appropriate bodies.
>
> In the event of a disputed account, make available to the consumer all related supporting information and documents with an explanation of all charges, and provide trained personnel to assist the consumer and/or creditor-client in attempting to resolve any existing dispute regarding his account.
>
> When a consumer absolutely refuses to pay or even discuss an account, cease further direct efforts with the exception of advising the consumer that the collector's further efforts are being terminated and that there is a possibility of the creditor's attorney invoking the creditor's remedies locally available.
>
> Not publish, post, or cause to be published or posted any list of debtors commonly known as a "deadbeat list" for the purpose of forcing or attempting to force collection thereof.
>
> Cooperate with qualified community counseling services and other appropriate agencies and refer consumers to them as such needs appear.
>
> *Make telephone and personal calls during such hours and with such frequency as would be regarded reasonable.* (emphasis supplied) *Id.*, at 11-12.

[26] *See generally, Staff Report, supra* note 23 at 2-96; HOUSE COMMITTEE ON BANKING, CURRENCY AND HOUSING, DEBT COLLECTION PRACTICES ACT REPORT, H.R. REP. No. 1202, 94th Cong., 2nd Sess. (1976) (hereinafter, HOUSE REPORT); B. CLARK AND J. FONSECA, HANDLING CONSUMER CREDIT CASES, 109-121 (1975) (hereinafter, CLARK).

While one commentator has enumerated what he calls the "twelve deadly sins of credit collection,"[27] the range of abusive tactics available seems to be limited only by the imagination of the collector. Frequently used are the following: threatening force or violence, threatening legal action when it is beyond the collector's power to sue or when there is no intent of doing so,[28] communicating with third parties (friends, relatives, employers), making public denunciations, simulating governmental status, simulating legal process (and/or using legalese), threatening to repossess without intent to do so,[29] threatening credit ratings, attempting to or collecting disputed or nonexistent debts, communicating with unreasonable frequency or at unreasonable times, using obscenity, continuing to communicate with the debtor when an attorney has been retained and continuing dunning notices or allowing a computer to continue dunning notices or add finance charges after being made aware that the debt is disputed.[30]

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[27] Testimony of Henry Stern, First Deputy Commissioner of the New York City Department of Consumer Affairs, *Hearings Before the Joint (N.Y.) Legislative Committee on Consumer Protection on Debt Collection Practices* 65, 70-73 (December 11, 1972) (hereinafter *Hearings, December 11, 1972*).

[28] Since a collector will typically receive compensation only if he is successful, there is an incentive to use whatever means he can think of to collect without a lawyer's involvement.

[29] It is interesting to note that only eight percent of default cases result in repossession, so the threat is rarely made with intent to do so. Primarily, this is due to the relatively low resale value of consumer goods. Nonetheless, the tactic is productive because the low-income debtor knows that replacement cost is very high. *See, Staff Report, supra* note 23 at 19.

[30] *See*, generally, Stern, *Hearings, December 11, 1972, supra* note 27; testimony of Richard A. Dutcher, Assistant Attorney General, State of New York, *Hearings Before the Joint (N.Y.) Legislative Committee on Consumer Protection on Consumer Debt Collection Practices* 4 *et. seq.* (December 7, 1972) (hereinafter *Hearings, December 7, 1972*); *Staff Report, supra*, note 23 at 18; CONSUMERS IN TROUBLE, *supra* note 2 at 177, 189; also see A. 46a.

Such harassment tends to coerce a debtor into paying irrespective of the validity of the debt,[31] the existence of valid defenses,[32] or the status of the debtor as judgment-proof.[33] The reasons are clear: fear of bodily harm, ruined reputation, loss of employment[34] or even embarrassment; the feeling that nothing can be accomplished by contesting; ignorance of what protections the law affords; and inability to afford an attorney. Richard A. Givens, New York Regional Director, Federal Trade Commission, has stated:

> "Some may ask, 'Why is the Government protecting deadbeats?' or, put in another way, 'Haven't we, as businessmen, the right to use any and all means to collect from persons we have been good enough to extend credit to?' These are fair questions. But we have found that in numerous instances the collection tactics I have described here today are used against

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[31] Such harassment could occur where the amount has been paid, and there is a computer error and the amount was never owed or the services were performed under warranty or other agreement.

[32] Such valid defenses would occur where an insurer is liable or the product is defective. *See*, i.e., 16 C.F.R. Part 433 (Preservation of Consumers' Claims and Defenses), and discussion thereof at 40 Fed. Reg. 53506 *et. seq.* (November 18, 1975) and Federal Trade Commission, *Staff Guidelines on the Trade Regulations Rule Concerning Preservation of Consumers' Claims and Defenses* (1976).

[33] Many states exempt from satisfaction of money judgments items of personality and realty, which, depending on the debtor, may comprise all his assets. *See* N.Y. CPLR §§ 5205, 5206. (McKinney 1975). Furthermore, current income derived from Social Security, Welfare or Unemployment Insurance is exempt. 42 U.S.C.A. 407 (1974); SOCIAL SERVICES LAW § 137-a (McKinney 1976); LABOR LAW § 595 (McKinney 1965).

[34] Typically, an employer will deem an employee irresponsible if he has outstanding debts. Both civilian and military federal employees are subjected to such pressure. *See*, Civil Service Commission, *The Federal Personnel Manual*, Chapter 735, subchapter 2-7, cited at *Staff Report, supra* note 23 at 53-57; *Staff Report, supra*, note 23 at 57-61.

persons who, in fact, would have had a valid defense to the charge of non-payment—such defenses as defective merchandise or service, non-delivery or return of the item, prior payment, or an honest dispute about payments, and similar defenses. Unfortunately, these tactics help, in many instances, dishonest operators to collect for the sales of goods and services for which they ultimately would not collect if the debtors had 'their day in court.' For instance, it is easy to understand why a debtor would pay even an unjust debt if his employer becomes involved in the collection process. Obviously, he would rather pay a claimed debt than chance losing his job. The same holds true for the various threats used by some creditors or collection agencies."[35]

Many jurisdictions have adopted remedial legislation in response to these abusive practices, ranging from the broad and severely restrictive licensing and prohibited practices, found in California[36] and Minnesota[37] through the private right of action in Texas,[38] to the regulatory

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[35] Remarks of Richard A. Givens, Regional Director, New York Region, Federal Trade Commission, submitted to *Hearings, December 11, 1972, supra* note 27 at 61.

An indication of public importance is provided by the report broadcast on *Sixty Minutes* (C.B.S., September 19, 1976), wherein continuing abusive practices in Minnesota were discussed. Minnesota has one of the best deceptive collection practice statutes, *infra*, note 36.

[36] West, CAL. ANN. BUS. & PROF. CODE Article 10. *See*, particularly, § 6947. *See also*, § 17538.7.

[37] M.S.A. § 332.31 *et seq*. *See*, particularly, § 332.37.

[38] Vernon's Ann. Civ. St. art. 5069-11.01 through 11.11. *See*, particularly, §§ 11.02, 11.03 and 11.10. *See also, Ledisco Financial Services, Inc.* v. *Viracola*, 533 S.W. 2d 951 (Ct. Civ App., Texarkana, 1976), approving the statutory private right of recovery.

scheme of Massachusetts[39] and the prohibited practices statute of New York.[40] In addition, under its broad general grant of powers,[41] the Federal Trade Commission has attempted to reduce the incidence of abuse in interstate commerce, both by regulation[42] and administrative action.[43]

New York's Debt Collection Procedures statute is probably typical, listing nine prohibited practices and making violation a misdemeanor, enforceable by the Attorney General or District Attorneys. The problems, however, are many. Not only are some major abuses not proscribed,[44] but the statute as it stands is difficult to enforce with no private remedy.[45]

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[39] M.G.L.A. c. 93 § 24 *et. seq*. *See*, particularly, § 49. *See also*, M.G.L.A. c. 272 § 97 A and 1969 Regulations of Commissioner of Banks, 35 UNAUTHORIZED PRACTICE NEWS 27 (December 1970).

[40] N.Y. GENERAL BUSINESS LAW Article 29-H (McKinney Supp. 1975). *See*, particularly, § 601.

[41] 15 U.S.C.A. §§ 45, 46 (1973). A more specific grant of authority is contained in H.R. 13720/S. 3838, which has passed the House, but has just been introduced in the Senate where no action is expected in the 94th Congress.

[42] *Guides Against Debt Collection Deception*. 16 C.F.R. Part 237 (1968).

[43] *In re Nosoma Systems, Inc.* (File No. 732 3348, 1976) is the most recent case in which a consent decree has been signed. *See also*, for example, *In re Inter-Continental Services Corp., et al.* (File No. 752 3195, 1975); *In re State Credit Association, Inc., et al.* (File No. 732 3104, 1975); *In re CTC Collections, Inc., et al.* (File No. 752 3106, 1975), indicating an extremely large volume of such practices which have been discovered by the FTC.

[44] Omissions include public denunciation when the information regarding the debt or creditworthiness is not known to be false, continued communication with a debtor after an attorney has been retained, threatening the use of force or violence, and using obscenity.

[45] In *State of New York* v. *I.C. System, Inc.*, 46 A.D.2d 873, 361 N.Y.S.2d 930 (1st Dept., 1974), *aff'd* 38 N.Y.2d 767, 381

(footnote continued on following page)

The pattern set by the extrajudicial collection practices just described continues through collection by judicial action. The confusion of debtors by the multiplicity of papers received and contacts made is a recurrent feature of this pattern.

D. Over Ninety Percent Of Collection Actions End With A Default Judgment And Most Of These Judgment Debtors Do Not Know A Default Judgment Has Been Entered

When the extrajudicial methods of collection fail, creditors usually initiate suit for collection of the debt. Under New York Law, an action is commenced by the service of the summons.[46]

The vast majority of consumer credit actions in New York and throughout the country end in default judgment. Over 90 percent of New York City consumer actions result in default judgments.[47] One study of 23 New York City collection attorneys revealed that in one three-month period, 15 of the 23 obtained default judgments in 100 percent of the consumer lawsuits they initiated. Another

(footnote continued from preceding page)

N.Y.S.2d 55 (1975) the Attorney General sought an injunction against Respondent's use of a series of seven form letters. "It is the number, frequency and nature of these letters that led the Attorney General to conclude that they tended to be deceptive and misleading to the debtors and to be of the harassing nature which the new 'Debt Collection Procedures' Statute, particularly, was intended to prevent." Main Brief for Petitioner-Appellant in the Court of Appeals at 4. The Brief also indicated specific objections to each letter in light of that act and the EXECUTIVE LAW § 63(12). *Id.*, at Appendix C.

Having recognized the problem, some jurisdictions have now declared coercive tactics actionable under the rubric of intentional infliction of emotional harm. In New York, *Long* v. *Beneficial Finance Co.*, 39 A.D.2d 11, 330 N.Y.S.2d 664 (4th Dept., 1972), seems to stand alone for that proposition.

[46] N.Y. CPLR § 304 (McKinney Supp. 1975).

[47] *See, Staff Report, supra* note 23 at 116.

attorney ". . . estimated that he instituted 7,000 lawsuits annually of which 90 percent resulted in default." Federal Trade Commission, New York Regional Office Staff Report of Debt Collection Hearings 164-165 (1973). A study of two New York City retail furniture stores revealed that in 1971 they alone accounted for 831 default judgments.[48] A study of imprisonment for debt in Onondaga County revealed that most of the judgments won by creditors in the cases studied were by default.[49] In the case now before the Court, appellees Vail, Ward, McNair, Hurry, Nameth, Humes and Harvard had default judgments taken against them. (A. 13a, 20a, 25a, 55a, 58a, 64a).

The reasons for this excessively large number of defaults can be attributed in major part to at least four complex causes: incomprehensible summons; "sewer service" of the summons; complex legal procedures and lack of available legal representation; and improper venue for the case.

(i) The Summons Form Is Confusing And Complex And Does Not Provide Notice Of The Lawsuit Nor The Responsibilities Flowing From It

David Caplovitz's study, CONSUMERS IN TROUBLE, A STUDY OF DEBTORS IN DEFAULT, revealed that where service of the summons was completed, 15 percent of these defendants simply did not realize that a lawsuit had been commenced against them, or if they did, did not know how to properly respond.[50] Caplovitz's study further disclosed

[48] Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 COLUM. J. OF L. AND SOC. PROB. 370, 371 n.11 (1974) (hereinafter *Due Process Denied*).

[49] Alderman, *Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York*, 24 SYRACUSE L. REV. 1217, 1225 (1973) (hereinafter *Imprisonment for Debt*).

[50] *Consumers in Trouble, supra* note 2 at 205.

that only four percent of the New York City defendants, who were actually served, answered, as compared with 36 percent in Chicago and 34 percent in Detroit.[51] This result is attributable in large measure to the archaic and confusing form used in New York as compared to the noticeably simpler and easier to understand forms used in the other jurisdictions.

In 1973, the New York Regional Office of the Federal Trade Commission published a report of the testimony and public hearings held on the subject of debt collection practices in the New York, New Jersey and Connecticut region. Considerable emphasis was placed on the role of the judicial process in debt collection.[52]

Most witnesses who testified on the matter, including legal services attorneys and collection attorneys, agreed that the language of the summons was too difficult to understand, especially for an uneducated consumer.[53] Professor David Caplovitz testified that his studies demonstrated that many defendants do not understand what the summons says because:

> "The language of the summons, especially in New York, virtually defies understanding and . . . even a well-educated person would have difficulty understanding the message of the summons."[54]

In 1971, a pilot study, sponsored by the New York City Consumer Protection Coordinating Committee, was conducted respecting default judgments in the New York City area.[55] Several attorneys subpoenaed to testify indicated

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[51] *Id.*, at 204.

[52] *Staff Report, supra* note 23.

[53] *Id.*, at 119.

[54] *Id.*

[55] *Id.*, at 160.

that one reason for the high percentage of defaults was a "lack of understanding about the summons itself."[56] Many defendants "do not understand the effect of a failure to answer the summons because of its highly technical language."[57]

In 1972, a report by the New York City Bar Association's Special Committee on Consumer Affairs declared that "... procedural defects often approach the outrageous and their impact is greatest upon the poor."[58] One defect considered was the "antiquated forms of summons and complaint which even when properly served, failed to alert the consumer to the fact and seriousness of the suit."[59]

In 1973, an empirical study[60] was conducted in Onondaga County, New York, to determine whether New York's statutory scheme for the enforcement of money judgments provided low income debtors with effective protection of their right to due process of law. Over 10 percent of the debtors interviewed as part of this study were confused as to whether they had received the summons and what it meant.[61] In other words, they did not know they were being sued. Several subjects of the study felt they had adequately "answered" the summons by calling the creditor or the creditor's attorney.[62]

The study concluded that the present system fails to provide adequate notice to the debtor of the nature and

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[56] *Id.*, at 165.

[57] *Id.*, at 166.

[58] Committee Report, The Special Committee on Consumer Affairs, *Toward the Informal Resolution of Consumer Disputes*, 27 Rec. of N. Y. C. B. A. 419, 420 (1972).

[59] *Id.*, at 421.

[60] *Imprisonment for Debt, supra* note 49.

[61] *Id.*, at 1233.

[62] *Id.*, at 1234.

consequences of the impending lawsuit."[63] The study suggests that:

> "Many defaults are due to the debtor's inability to understand his legal rights rather than a voluntary waiver of them. Simplified language may not eliminate all such problems, but its benefit clearly outweighs the minimal cost that would be involved in promulgating a new statutory form.'"[64]

The confusing summons form produces the same due process deficiency challenged in the case before the Court—the absence of clear, understandable notice.

(*ii*) *Some Summons Are Never Served On The Debtor But Instead Are "Sewer Served"*

Increasingly in recent years, commentators, community groups and the government have been concerned about the degree to which consumer defendants are not served with summons.[65] The causes are numerous, including a server's deliberate policy of maximizing profits by taking on more jobs than he can actually handle or than he wishes to,[66] and his fear of entering the area of residence (frequently the

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[63] *Id.*, at 1242.

[64] *Id.*, at 1241.

[65] *Due Process Denied, supra* note 48 at 383 & n.56.

[66] This may be concluded from such evidence as one server claiming in affidavits in different cases to have made service in Brooklyn and the Bronx within ten minutes (Givens, *Hearings, December 11, 1972, supra*, at 59); the surveillance by postal inspectors showing that a server never left lower Manhattan on days he claimed to have served defendants in thirty-two cases at geographically distant locations [Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972); *United States* v. *Wiseman*, 445 F. 2d 792 (2nd Cir., 1972)]; and the routine signing and notarizing of blank affidavits (*Staff Report, supra* note 23 at 184).

inner city) or actually confronting the defendant.[67] Whatever the cause, the abuse has become widespread, with papers frequently being literally dumped in the street or left in vestibules[68] and false affidavits routinely being filed.[69] The magnitude of the problem has been recognized by State and Federal Courts alike, in civil and criminal matters.[70]

The consequence has been the perpetration of a fraud on the court in each such instance; unknowingly, the court will then become a partner in the denial of one of the most basic of all rights. As this Court declared in *Schroeder* v. *City of New York*:

> "As was emphasized in *Mullane*, the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard. 'This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'"[71]

The dimensions of the abuse and gravity of the deprivation of the rights of consumer debtors caused the State of New York to act. In the new Penal Law promulgated in 1965, false swearing in an affidavit was rendered a Class E

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[67] *Staff Report, supra* note 23, at 100, 114-115.

[68] *Clark, supra* note 26, at 115; *Staff Report, supra* note 23, at 98-105, indicating the problem exists in many urban areas.

[69] *United States* v. *Wiseman*, 445 F. 2d (1971); *United States* v. *Barr*, 295 F. Supp. 889 (S.D.N.Y., 1969); *United States* v. *Brand Jewelers*, 318 F. Supp. 1293 (S.D.N.Y., 1970); *A.B.C. Process Serving Bureau Inc.* v. *City of New York*, 63 Misc. 2d 33, 310 N.Y.S. 2d 859 (Sup. Ct., N.Y. Co., 1970); *Judo, Inc.* v. *Peet*, 68 Misc. 2d 281, 326 N.Y.S. 2d 441 (Civ. Ct., N.Y. Co., 1971); *Central Budget Corp.* v. *Knox*, 62 Misc. 2d 66, 307 N.Y.S. 2d 936 (Civ. Ct., N.Y. Co., 1969).

[70] See cases cited in note 69, *supra*.

[71] 371 U.S. 208, 212 (1962).

felony."[72] This was insufficient, however, to end the practice, as was the licensing of process servers required by New York City beginning in 1969."[73]

Testimony, comment and court decisions indicated the need for further action, and New York in 1973 became the first state to attempt to put an end to the practice legislatively,"[74] by adding a requirement that an affidavit contain a physical description of the person served"[75] and mandated that process servers keep certain records."[76] In approving this legislation, the Governor stated:

> "There is, perhaps, no more despicable a corruption of our system of civil justice than the practice known as 'sewer service.' In 1970, historic legislation was enacted allowing for the mailing of a summons to a defendant coupled with delivery of the summons to a person of suitable age and discretion at the defendant's home or place of employment. While the 1970 law has helped to reduce the incidence of 'sewer service,' the practice has not been totally eliminated.
>
> This bill represents a significant step towards the total elimination of the practice of 'sewer service' and the invidious effect it has on the rights of defendants. In addition to protecting the individual defendant in a specific case (since the affidavit of proof of service will be immediately before the court), the bill establishes a general deterrent to the practice of 'sewer service' by requiring process servers to keep records of their activities."[77]

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[72] N.Y. PENAL LAW § 210.40. (McKinney 1975).

[73] N.Y. CITY ADMIN. CODE Ch. 32, art. 43 (1969).

[74] *Sewer Service, supra* note 8, at 420.

[75] N.Y. CPLR 306(b) (McKinney Supp. 1972).

[76] GENERAL BUSINESS LAW, Article 8, L. 1973, c.397.

[77] Memorandum on Approving L. 1973, c.397 (June 5, 1973) [McKinney's 1973 Session Laws, Vol. 2 at 2344].

How effective such statutes will be is open to question, as evidenced by the post-enactment dispute over the subsidiary question of admissibility of a process server's affidavit, and the decisions thereon in *Queensboro Leasing* v. *Resnick*[78] and *Master Nav. Co.* v. *Great Circle Ship Corp.*[79] In the latter, it was pointed out that:

> ". . . there is no statutory exception to the hearsay rule admitting such affidavits in evidence nor should common law confer any such exception on the basis of trustworthiness or necessity.
>
> . . . Dean McLaughlin rejects the common law view of *Queensboro Leasing, Inc.* v. *Resnick*, supra, relying on the trustworthiness of a process server's affidavit as being guaranteed by his exposure to a negligence action by his employer for a falsehood as held in *Heredia* v. *Contino*, 79 Misc. 2d 222, 360 N.Y.S. 2d 144 (App. Term 9 & 10 Dept. 1973). But this view ignores the realities of sewer service which, as pointed out in *Queensboro Leasing, Inc.* against *Resnick*, supra, is not an isolated practice in this city and has necessitated recent statutory protection against such abuses."[80]

Whether the law has served to reduce the volume of sewer service is impossible to determine. Clearly, the only matters which will come to the attention of the courts of civil jurisdiction will be those in which there has been an execution of some sort, the person understands what is happening, desires to contest or protest and actually goes to a lawyer or governmental agency, a combination of factors which is rare in consumer credit actions."[81]

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[78] 78 Misc. 2d 919, 358 N.Y.S. 2d 939 (Civ. Ct., Queens Co., 1974).

[79] —— Misc. 2d ——, 383 N.Y.S. 2d 826 (Civ. Ct., N.Y. Co., 1976).

[80] *Id.*, at ——, 383 N.Y.S. 2d at 828.

[81] Schrag, *New Court Rule Will Curb "Sewer Service"*, 173 N.Y.L.J. 1 (February 13, 1975).

(iii) Improper Venue Contributes To Default Judgments

Whether or not a debtor is served, an action may be sited in a place distant from his home, rendering the forum inconvenient. The result is to allow a creditor to select the forum to the debtor's disadvantage.

> "The downstate consumer may find defending a suit in Chicago nearly impossible. He must transport himself and his witnesses to Chicago, which may be several hundred miles away, and may have to do so repeatedly if the other party obtains continuances. Sending his hometown lawyer to Chicago to defend a small claim would be too expensive, so the consumer must either represent himself or hire a Chicago lawyer, whom he is unlikely to know even by reputation. Finally, the downstate consumer is likely to be intimidated by—and perhaps distrustful of—the Cook County courts. Faced with these difficulties, even the consumer with a valid defense is likely to default."[83]

Similar to the Illinois statute,[84] which requires that a consumer credit transaction be sued upon in the debtor's home county or where the transaction occurred, the Texas venue requirement is that suit be brought in the defendant's county of residence.[85] However, in Texas, the courts have apparently failed to adequately regulate creditors' practices, thirty-three exceptions having been grafted onto the basic rule, resulting in a large volume of litigation and a continuation of venue abuse.[86] Empirical research has revealed that non-residents of a county were doubly likely to default when sued by one finance company.[87] In Illinois, although at least one court has held that the statute is to be strictly construed (*American Oil* v. *Mason*),[87] the Illinois Supreme Court has not yet changed its traditional view.[88]

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[83] Harper and Farber, *Illinois Venue Law and The Consumer*, 63 ILL. S.B.J. 449 (1975). *See also*, submitted testimony of Givens, *Hearings, December 11, 1972, supra* note 35, at 59; *Due Process Denied, supra* note 48, at 389 & nn. 83, 84.

[84] Ill. Rev. Stat. ch. 110, § 5 (1973).

[85] Vernon's Ann. Civ. Stat. art. 1995 (1964).

[86] Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEX. L. REV. 269, 270 (1973) (hereinafter Sampson).

The situation in New York provides a clear illustration of the enactment of omnibus measures to curtail such abuse and their apparent failure. In 1973, the State required not only that venue be in the consumer's home county,[89] but also directed clerks to reject summonses for filing that were plainly violative.[90] In approving the statute, Governor Rockefeller commented,

> "Under existing law, a creditor may commence a suit against a consumer-debtor in the county in which the creditor has its corporate 'home'. Often, that county may be one which is far distant from the debtor's place of residence or the places where he trades. The commencement of a suit in a place that is highly inconvenient to the debtor has the effect of discouraging and, indeed, preventing many debtors from appearing in the action and asserting what would otherwise constitute a valid defense.
>
> This bill, by requiring that a suit arising out of a consumer credit transaction be commenced in a county convenient to the buyer, will help to insure that the buyer may appear and take full advantage of his 'day in court.' "[91]

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[87] *Id.*, at 278-279.

[87] 133 Ill. App. 2d 259, 273 N.E. 2d 17 (1st Dist., 1971).

[88] *See*, for an example of that view, *People ex. rel. Carpentier* v. *Lange*, 8 Ill. 2d 437, 441, 134 N.E. 2d 266, 267-68 (1956).

[89] N.Y. CPLR § 503(f).

[90] N.Y. CPLR Rules 513 and 305(a).

[91] Memorandum of Approval, L. 1973, c.238 [McKinney's Session Laws of 1973, Vol. 2, P. 2240].

The problem which arises is the lack of any real penalty for violation—the only relief is a change of venue. *Empire Nat. Bank (BankAmericard Div.)* v. *Olori.*[93] Therefore, as in other instances of abuse, only an alert defendant who knows his rights, is desirous of contesting, and goes to an attorney, will take any action.

There was and continues to be no incentive to any creditor to obey the strictures of the law. One commentator has summarized the advantage to the creditor to deliberately not obey.

> "Of course, the creditor does obtain two significant advantages. First, centralization of collection suits in a single county undoubtedly provides a substantial economic saving: a lawyer specializing in collection practice may be hired or retained; lawsuits can be cranked out at a low unit cost by use of form petitions; and by careful docket scheduling one lawyer may appear for a dozen hearings at a time. Second, the prosecution of a suit in a forum far from the defendant's residence greatly increases the likelihood of a default judgment, with a corresponding saving of legal fees.'"[94]

(iv) Procedures To Defend A Civil Action Are Complex And Legal Representation Is Unavailable

The procedures for defending an action, including a collection suit, are set forth in detail in the New York Civil Practice Law and Rules. The time periods in which to answer a complaint depends on the method of service and, when applicable, the date the affidavit of service was filed.[95]

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[93] ___ Misc. 2d ___, 384 N.Y.S. 2d 948 (Sup. Ct., Orange Co., 1976).

[94] Sampson, *supra* note 85, at 275.

[95] N.Y. CPLR § 308 (McKinney Supp. 1975).

The debtor must understand the applicable statute and the formula to compute the time as well as the method of service in order to timely answer the complaint.

In a recent *St. John's Law Review* article on "Abuse of Process," Elizabeth DeFeis concluded, "[c]onsumer defendants, many of whom are poor and have never had any contact with lawyers and courts, cannot and should not be expected to respond properly to confusing and complex forms and procedures which were created for businessmen and sophisticated individuals and the lawyers representing them."[96]

The alternative is for the debtor to retain an attorney. However, "In the usual consumer case, the sum involved may be so small that it would be greatly exceeded by the cost of paying a private attorney to litigate."[97] The larger the debt, the greater incentive for the debtor to seek legal services." This correlation limits a debtor's access to the judicial system by forcing the debtor to absorb the smaller debts even when a defense may exist.

(v) The Seriousness Of The Problem Created By The Large Number Of Default Judgments Is Reflected In The Variety Of Procedures Implemented In The New York City Courts To Reduce The Number

The New York City Court Act Section 401 was amended in 1968 to direct the defendant to make a personal appearance at the courthouse to file an answer. This procedure allows the clerk to assist the defendant with questions concerning the summons and answer, thus reducing the

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[96] *Abuse of Process and Its Impact on the Poor*, 46 ST. JOHN'S L. REV. 1, 23 (1971).

[97] *Staff Report, supra* note 23, at 131, 132.

[97] *Consumers in Trouble, supra* note 2, at 224.

problems which are caused by a lack of understanding of the form on the part of the defendant (although creating an additional inconvenience by requiring the defendant to appear in court).

In 1970, NYCCA Section 401(d) was added to require that summonses served in an action arising from a consumer credit transaction be printed legibly in both Spanish and English. The purpose of the amendment was to help reduce the problems encountered by Spanish speaking people when confronted with legal papers written in a language they do not understand.[98]

In 1973, 22 NYCRR Section 2900.2 was amended to require the following notice to be attached to a summons for an action arising out of a consumer credit transaction. The notice must be printed in not less than 12 point upper case type at the top of the summons:

Important!! You Are Being Sued!!

THIS IS A COURT PAPER—A SUMMONS

Don't throw it away! Talk to a lawyer right away!! Part of your pay can be taken from you (garnisheed). If you do not bring this to court, or see a lawyer, your property can be taken and your credit rating can be hurt!! You may have to pay other costs too!! If you can't pay for your own lawyer, bring these papers to this court right away. The clerk (personal appearance) will help you!!

The notice is also printed in Spanish, whether or not the complaint is included, and is also attached to a notice of motion for summary judgment.

Philip Schrag, professor at Columbia Law School, writing in the New York Law Journal said, "the caveat

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[98] Memorandum on Approving L. 1970, c. 302 (May 1, 1970) [McKinney's 1970 Session Laws, Vol. 2 at 3094].

has helped to give meaningful warning to those defendants who have been served with civil court process," and "has been a laudable contribution to the dispensation of justice in the Civil Court."[99]

Finally, the Rules of Practice in the Civil Court of NYC was recently amended to establish a very stringent procedure for entering default judgments in consumer credit actions commenced after March 1, 1975.[100] Seven days prior to the entry of the default judgment, the defendant must be mailed a notice alerting the debtor that the plaintiff intends to apply for the entry of a default judgment. The return address on the envelope is the street address of the Civil Court. If the envelope is returned by the Post Office to the Clerk because it could not be delivered for any reason except refusal or unclaimed by the addressee, no default judgment can be entered.

These new procedural requirements begin to deal with the broad problems of the large percentage of judgments by default. These severe modifications in procedure dramatize both the seriousness of the problem and the obvious recognition of the problem by the courts in New York City.

It should be noted that the reforms adopted for New York City have not been followed in other parts of the state, including Dutchess County.

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[99] Schrag, *New Court Rule Will Curb "Sewer Service"*, 173 N.Y.L.J. 1 (February 13, 1975).

[100] 22 NYCRR § 2900.18.

III. The Use Of Civil Contempt In Supplementary Proceedings Is An Integral Part Of The Collection Process Beginning With Summons And Complaint And Continuing Through Default Judgment And Resulting In Some Instances In Imprisonment For Debt

The supplementary proceedings stage in a creditor's action against a debtor includes use of devices to obtain information about the debtor's assets and devices to apply money or property to the satisfaction of the judgment. It is at this stage that the specific issues pertinent in this case arise. These procedures must be seen, however, as a segment of the entire process beginning with the summons and complaint and perhaps earlier with pre-suit extra legal attempts to collect or with the extension of credit itself. For example, where a default judgment has been obtained against a debtor who has failed to answer because he could not understand the summons and complaint,[101] it is likely that similar difficulties will arise during the supplementary proceedings stage. The debtor who could not understand the papers served prior to judgment may be expected to have problems understanding papers served in supplementary proceedings.[102]

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[101] For a discussion of debtors inability to comprehend legal papers served upon them see p. 21 *supra*.

[102] The inability of debtors to understand papers served subsequent to judgment is demonstrated by the number of debtors who repeatedly undergo default judgment and commitment, who are willing to cooperate with creditors, but who nonetheless are unable to understand why they were fined or how they could prevent it. Richard Alderman in *Imprisonment for Debt, supra* note 49, found that although 47.5% of the subjects studied previously had had a judgment entered against them, and approximately 30% of these previously had had a commitment order issued against them, none of these debtors understood why they were fined or how they could prevent it. *Id.* at 1235. Of 467

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A. The Judgment Creditor Has A Number Of Devices For Reaching The Income Or Other Property Of A Judgment Debtor. Some Of These Require The Use Of Supplementary Proceedings Which May Include The Unconstitutional Contempt Process Challenged In This Case

There are a variety of devices in New York for applying the debtor's income or other property to the satisfaction of a judgment.

Among the methods for reaching a judgment debtor's income are the income execution[103] (garnishment) and the installment payment order.[104] A creditor may also obtain

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cases in the study, 31% were fined more than once to compel disclosure. In 40 cases, the debtor was held in contempt 3 or more times with one debtor suffering contempt 7 times. *Id.* at 1236. Alderman poses the question why debtors would undergo repeated fines, suffer added court costs, and the threat of jail, despite a willingness on the part of debtors to cooperate with creditors. One answer, that may be inferred, is that debtors do not understand either the meaning or the legal significance of the papers served upon them.

[103] N.Y. CPLR Section 5231.

[104] N.Y. CPLR Section 5226.

The payment of a fine in installments must be distinguished from an installment order under N.Y. CPLR § 5226 (McKinney 1963). Orders to pay support or alimony are analogous to installment payment orders. While none of the debtors in this case are subject to an installment payment order, its use does present analogous problems of imprisonment for debt through the use of civil contempt and a number of cases cited in the Attorney General's brief arose from the use of installment payment orders. See Brief for Appellants, at 23, *Vail* v. *Quinlan*, 406 F. Supp. 951 (1976) *citing Sure Fire Fuel Corp.* v. *Martinez*, 75 Misc. 2d 714, 348 N.Y.S. (Civil Ct., N.Y. Co., 1973); *Uni-Serv Corp.* v. *Linker*, 62 Misc. 2d 861, 311 N.Y.S. 2d 726 (Civil Ct., N.Y. Co., 1970).

Alderman's study revealed that in a slight majority of the cases involving installment payment orders, "the subject was totally unaware of the existence of the order. In two-thirds of the remaining cases the subject knew that an order existed but

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the judgment debtor's property, CPLR Art. 52, among other ways, by the usual process of levy and execution, or by applying for a writ of replevin, CPLR Art. 71, or order of attachment, CPLR Art. 62.

However, the creditor's first task after judgment is to locate the debtor's assets to be used to satisfy the judgment. In a number of instances, the judgment creditor "will be aware of the location of assets of the judgment debtor." H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 428 (5th ed. 1976) (hereinafter NEW YORK PRACTICE UNDER THE CPLR). A creditor will often have a financial statement from the debtor listing a place of employment. In these circumstances the creditor can proceed directly from judgment to collection by levy and execution or garnishment. If the debtor has no assets or no income subject to garnishment or the creditor is not aware of these, the creditor may decide to use one of two available procedures for disclosure of assets.

A creditor's attorney can issue a subpoena requiring the attendance of the debtor for an examination concerning the disclosure of assets at the courthouse or some other location specified by the creditor's attorney.[105] "Leave of the court is not required for the issuance and service of the

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was unable to convince the interviewer that he understood what one was." *Imprisonment for Debt, supra* note 49 at 1237.

Failure to comply with an order directing the judgment debtor to make installment payments may be punished as contempt of court pursuant to CPLR § 5251 which states:

> "[r]efusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court." N.Y. CPLR § 5251 (McKinney Supp. 1975-1976).

[105] N.Y. CPLR Section 5223 and Section 5224(a)(1).

subpoena." NEW YORK PRACTICE UNDER THE CPLR at 429. But it must be served in the same manner as a summons. CPLR Section 2303.

In the alternative, an information subpoena can be issued requiring the judgment debtor to provide sworn answers under oath to a list of written questions and to return the answers by mail to the creditor's attorney within seven days. CPLR Rule 5224(a)(3). "An information subpoena may be served by registered or certified mail, return receipt requested." NEW YORK PRACTICE UNDER THE CPLR at 430.

The enforcement of the information subpoena and the subpoena for examination concerning assets depends on the challenged contempt procedures. CPLR Section 5251. However, use of either subpoena may lead directly to the collection of the judgment rather than the disclosure of assets.[106] This would occur where the debtor fails to respond to either subpoena and ultimately is fined by the court for contempt.[107] The fine which is payable in large

[106] The use of post judgment disclosure devices has been described by David Caplovitz in CONSUMERS IN TROUBLE, *supra* note 2, and Richard Alderman in *Imprisonment for Debt, supra* note 49.

[107] For discussion of creditors use of the contempt process to collect judgments see generally *Imprisonment for Debt, supra* note 49. Therein Alderman contends that the New York disclosure laws hav failed to meet their objective of disclosing debtor assets to creditors. Rather, the information subpoena and contempt process are utilized by creditors as a device to collect payment from often time unwitting debtors. Alderman states:

> "[t]he results of the study suggest a pragmatic creditor strategy: utilizing the contempt power, the creditor can be assured that the judgment actually will be paid, through court imposed fines enforced under the threat of imprisonment. By taking advantage of default judgments and *ex parte* contempt proceedings, the creditor is able to bypass the prescribed enforcement techniques (and their debtor-protection

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part to the creditor, if accompanied at some stage by a commitment order may be collected by a deputy sheriff under threat of imprisonment. In some instances, the debtor may actually be imprisoned[108] and then may obtain

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> provisions) and proceed directly to an action against the person of the debtor. For the debtor the choice is to pay the fine for contempt (which the court pays over to the creditor)—or be jailed." *Id.*

Debtors are repeatedly subjected to contempt following failure to respond to information subpoenas. For discussion of repeat contemnors see note 2 *supra*. Creditor preference for and reliance upon the information subpoena and contempt process to collect debts rather than to expose debtor assets is demonstrated in *Uni-Serv Corp.* v. *Batyr*, 62 Misc. 2d 860, 311 N.Y.S. 2d 456 (Civ. Ct., N.Y. Co., 1970). There the debtor appeared in court in response to creditor's subpoena, paid money on the account and signed a stipulation adjourning the examination one month. The court noted 18 similar stipulations entered into by the parties before an order to show cause why she should not be held in contempt and an attachment order was requested. The court refused to issue the order as it "would be the grossest abuse of discretion for me, faced with this pattern of harassment . . ., to issue this attachment. *Id.* at 861. The court further stated:

> "[i]f plaintiff wished to examine the defendant, its attorneys should have done so when she arrived in court in response to the subpoena. If they wished her 'contempt' adjudicated, they should have done so when, it seems, she came to court in response to the order to show cause." *Id.*

[108] Imprisonment for debt is not uncommon. Prior to 1970 and the decision of *Desmond* v. *Hachey*, 315 F. Supp. 328 (D. Me. 1970), declaring jail sentences for Maine debtors pursuant to the Maine statute violative of their rights, 200 debtors from two Maine counties had spent 1754 days in prison during a two year period because they were held in contempt of court. *Consumers in Trouble, supra* note 2 at 226 n. 1. Professor Caplovitz, in his empirical study of debt collection practice, has also noted similarities between the New York procedure and the former law in Maine. *Id.* Following *Desmond* v. *Hachey*, Maine has reformed its post judgment debt collection procedures to eliminate the obnoxious practice of imprisonment of debtors without a prior hearing. For discussion of the Maine law reform see Comment, *Post-judgment Procedures for Collection of Small Debts: The Maine Solution*, 25 MAINE L. REV. 43 (1973).

his release by payment of the fine provided that he has or can by some means find the funds to do so.[109] (See A.18a, A.28a, A.66a).

B. The New York Civil Contempt Practice Varies Depending On The Court And The Part Of The State And May Result In Imprionment For Debt

The use of civil contempt to enforce orders directing the payment of money or subpoenas requiring the disclosure of assets is then an integral part of the collection proc-

[109] Compare *Tate* v. *Short*, 401 U.S. 395 (1971), in which a Texas statute (and ordinance of the City of Houston) providing for imprisonment of persons unable to pay a fine for a period calculated at $5 a day was held to violate the equal protection clause.

When considering the "sinister implications" of post judgment disclosure devices Professor Caplovitz states:

> "[t]he tactic of the supplementary proceeding allows for the resurrection in the latter third of the twentieth century of that seemingly outmoded institution, debtor's prison. It is not known whether any debtor in our sample went to jail because of his failure to appear at a supplementary proceeding, but this contempt of court weapon was widely used against debtors in Maine, and an upstate New York Supreme Court judge has told us in a private communication that such sentences have occurred in his area. One victory for the OEO's legal services program was won in Maine in the summer of 1970, when legal services attorneys successfully argued before a three-judge federal court panel that such jail sentences were unconstitutional." CONSUMERS IN TROUBLE, *supra* note 2 at 226.

The use of such procedures is not infrequent.

Professor Alderman's study in Onondaga County, New York, revealed that in six sessions of the Onondaga County Court, Motion Term 455 consumer lawsuits were dealt with resulting in 296 contempt citations, 47 payment orders, 57 adjournments, and 55 discontinuances. *Imprisonment for Debt, supra* note 49 at 1230. Since Motion Term of Onondaga County Court is conducted on three consecutive Mondays of each month, it may be inferred that the use of post judgment information subpoenas followed by contempt and imprisonment is extensive.

ess.[110] The use of contempt results in imprisonment for debt or the threat of imprisonment for debt in a variety of circumstances. A creditor who has obtained an installment payment order may enforce it by civil contempt when the

[110] Two practice manuals describe the practice in different forms. These are *Sherwin, supra* note 14 and *Needham and Pollock, supra note* 2. *Needham and Pollock* indicate that:

1. contempt is used to punish failure to answer an information subpoena;
2. "[u]nder the scheme of the CPLR persons can be punished for contempt even though they were not served personally";
3. the proceeding for contempt "will be rendered academic if the judgment debtor then appears for examination";
4. "[e]xperience has shown that [such schooled?] judgment debtors may make the mistake of procrastinating so long that they may find themselves actually subject to a contempt order and the imposition of a fine. Failure to pay such fine will result in the imprisonment of the judgment debtor. Additionally, the fine cannot be discharged in any bankruptcy proceeding filed by the judgment debtor"; and
5. "[v]igorous pursuit of the contempt proceedings by the attorney for a judgment creditor is an essential principle in the successful enforcement of a judgment." NEEDHAM AND POLLOCK at 188-189.

The Needham and Pollock description shows that (a) contempt is used and indeed vigorously pursued as a means of collecting debts; (b) that a debtor who appears at a contempt hearing will not normally be punished—and hence those punished are those not at the hearing; and (c) that there is no personal service of the debtor before he is punished for contempt.

The Sherwin manual describes procedures similar to those used by the New York City Civil Court. Under this practice a warrant of attachment is used to bring a debtor before the court rather than imprisonment subsequent to an *ex parte* commitment order. There is nevertheless no requirement of personal service, a genuine possibility of imprisonment, and an opportunity for the creditor to obtain payment of the debt rather than information where the debtor has failed to answer an information subpoena. *Sherwin, supra* note 14 at 59-63.

New York City cases which follow the practice described by Sherwin include *Sure Fire Fuel Corp.* v. *Martinez, supra* note 6-4; *Uni-Serv Corp.* v. *Batyr, supra* note 104; and *Diamond and Frazer Iron Works, Inc.* v. *DiTullio,* 157 Misc. 800, 284 N.Y.S. 658 (City Ct. N.Y., Bronx Co., 1935).

debtor refuses to pay or has skipped payments.[111] A creditor's attorney who has issued an information subpoena or a subpoena directing a judgment debtor to appear for examination concerning assets may use the contempt procedure to compel disclosure or to obtain payment. The contempt process is also used in state supreme court or family court by spouses seeking to enforce orders directing payment of support or alimony.

New York is a large state divided into four Judicial Departments, 11 Judicial Districts, and 57 counties outside the City of New York. The practice concerning the use of contempt for these purposes varies depending upon the part of the state[112] and the rules governing the particular court.[113]

[111] Professor Alderman describes the New York practice concerning installment payment orders as the following:

> "Unlike the information subpoena, the issuance of the installment payment order is directed by the court. In issuing the order the court is mandated to consider 'the reasonable needs of the judgment debtor and his dependents.' Generally this information is obtained at a show cause hearing, and, as in the case of contempt, the debtor's failure to appear will constitute an acceptance of the creditor's terms. Often the amount of the installment payment order will be based on an alleged agreement by the debtor to pay a certain amount. This 'agreement' is incorporated into the court order *ex parte*. Once the order is issue the debtor is legally bound to pay the stated amount to the creditor, and, in the event that he fails to make the payments, he can be required to show cause why he should not be found in contempt." *Imprisonment for Debt, supra* note 49 at 1237.

New York cases stemming from installment payment orders include *Sure Fire Fuel Corp.* v. *Martinez, supra* note 104; and *Uni-Serv Corp.* v. *Batyr,* and *Linker, supra* note 104.

[112] The use of these procedures primarily by domestic relations and collection attorneys in different Judicial Departments and in particular county courts or supreme courts in various counties makes reform of the process extremely difficult. A reform in New York City will not produce a change in Onondaga County.

[113] Reform is also made difficult by the custom of some collection attorneys to abandon difficult actions. Note that many of the

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(i) In Domestic Relations Matters, The Contempt Statutes Governing Family Court Practice Include Steps Which Are Constitutionally Required, But Those Governing State Supreme Court Do Not

(a) *Family Court.* When a spouse has failed to obey an order of the Family Court directing the payment of support, the court may "issue a warrant directing that the respondent be arrested and brought before the court." N.Y. FAMILY COURT ACT Section 453 (McKinney 1975) (hereinafter, FAMILY COURT ACT). The subsequent procedure is described in FAMILY COURT ACT Section 454:

"If a respondent is *brought before the court* for failure to obey any lawful order issued under this article and if, after hearing, the court is satisfied by competent proof that the respondent has failed to obey any such order, the court may

(a) commit the respondent to jail for a term not to exceed six months, if the failure was willful. . . ." FAMILY COURT ACT Section 454 (emphasis supplied).

The court may suspend the order of commitment if satisfied that respondent will obey the orders of the court. FAMILY COURT ACT Section 455. A spouse brought before the court pursuant to a warrant must be advised of his right to counsel. FAMILY COURT ACT Section 433. Where the spouse is indigent, counsel will be assigned under the authority of FAMILY COURT ACT Section 262. *See, Rudd* v. *Rudd,* 45 A.D. 2d 22, 356 N.Y.S.2d 136 (4th Dept. 1974).

The debtors' problems in the case before the Court did not arise in Family Court. The Family Court procedures adhere substantially to the requirements of due process of law which appellees and the Consumer Protection Board contend were mandated constitutionally and not followed in the state court procedures which led to this case.

(b) *State Supreme Court.* The state supreme court which in New York is the lowest trial court of general jurisdiction may issue an order directing the payment of support in a domestic relations matter. The failure to obey such an order is punishable as contempt. N.Y. DOMESTIC RELATIONS LAW, Section 245 (McKinney Supp. 1975) (hereinafter, DOMESTIC RELATIONS LAW). The supreme court is not governed by the FAMILY COURT ACT. The general contempt procedures which appellees and the Consumer Protection Board are challenging in this case would be followed in a supreme court domestic relations case. Those procedures as applied in such a case were declared unconstitutional by the Supreme Court for Kings County in *Darbonne* v. *Darbonne,* 85 Misc.2d 267, 379 N.Y.S.2d 350 (1976). The case was decided after and re-

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creditors in this case did not appear in the United States District Court and are not represented before this Court. (J.S. 21a, A 156a, A 160a, A 162a, A 62a, A 82a). Reform in such circumstances may be possible only by a class action seeking declaratory judgment.

The custom of abandoning difficult cases may be influenced by the need for volume and efficiency in a collection practice. See A. RUBIN, FUNDAMENTALS OF THE COMMERCIAL PRACTICE 72-73 (1965) where it is stated:

> "The commercial attorney will soon find out that his success or failure depends to a large extent on his efficiency in handling well without vastly increasing his overhead . . . He must continually strive to improve his systems and techniques to give first quality service without undue cost. If he finds he is spending most of his day answering inquiries, his disenchantment is probably of his own making." *Id.;*

12 AM JUR *Trials* 197-8 where it is stated:

> "[s]uccesful collection attorneys streamline the collection procedure and do not spend much time and effort until there is some reasonable hope of success . . . In the absence of a policy reason, if no reasonable hope of making some recovery exists, the matter should be returned to the creditor-client . . . Because it is essential that counsel's time not be consumed in performing mechanical operations, a capable secretary can be taught to handle the routine administrative work. Volume is the secret to financial success in this type of practice, and a well trained secretary is the best way to handle volume." *Id.*

See also Stamm, *A Sweeter Road to Profits in the Commercial Practice,* 70 COM. L. J. 199, 199 (1965).

lied upon *Vail* v. *Quinlan*. In *Darbonne* the defendant did not appear in response to the order to show cause. The court describes the procedure it would have followed in the absence of *Vail* v. *Quinlan*:

> "There being no opposition, the court heretofore would ordinarily have granted the motion and ordered that the defendant be punished for contempt with leave to purge. Included in such an order would be a proviso that if the defendant did not comply with the purging terms therein, then without further notice, an order of commitment (i.e., imprisonment) may issue to the sheriff. 85 Misc.2d at 268, 379 N.Y.S. 2d at 351."[114]

The court remarked that "This entire procedure is authorized by DOMESTIC RELATIONS LAW, Section 245 and, as provided for therein, enforced by Article 19 of the JUDICIARY LAW." *Id.* Prior to *Vail* v. *Quinlan* in a case such as *Darbonne* in Supreme Court for Kings County the defendant would not have been brought before the court nor would he, even though indigent,[115] have been assigned counsel.

(ii) The Contempt Practice In The Civil Court For The City Of New York Under Article 19 Of The Judiciary Law Is Unconstitutional But Includes A Significant Step Constitutionally Required But Missing In the Contempt Practices Relevant In This Case

Article 19 of the JUDICIARY LAW which governs contempt proceedings describes two alternate procedures in JUDICIARY LAW Section 757. Under subsection 1 the court may

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[114] The procedure described and rejected in *Darbonne* is essentially that followed in appellee Rabasco's domestic relations case.

[115] For an example of a case out of Kings County where there is no indigent see *Walker* v. *Walker*, 51 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976).

issue an order directing the accused to show cause why he should not be punished for contempt. Under subsection 2 the court may, in the alternative, issue a warrant of attachment directed to the sheriff commanding him to arrest the accused and bring him before the court to answer for the alleged offense.[116]

A series of cases in the Civil Court for the City of New York has addressed the procedure to be employed when a creditor is seeking to punish a judgment debtor for contempt because he has failed to pay installments under an installment payment order.[117] In *Diamond and Frazer Iron Works, Inc.* v. *DiTullio*, 157 Misc. 800, 284 N.Y.S. 658 (City Ct. N.Y., Bronx Co., 1935), the court chose to employ the optional procedure found in JUDICIARY LAW

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[116] Sec. 757. *Order to show cause, or warrant to attach offender.*

> "The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either section seven hundred and fifty-five or seven hundred and fifty-six, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either
>
> 1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or
>
> 2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.
>
> Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court, at which a contested motion may be heard."

[117] For discussion of contempt as used against debtors failing to pay under payment installment orders see note 104 *supra*.

Section 757(2) and explained:

> "I do not think, however, that such orders should be made on the default of the judgment debtor. If he does not appear on the motion, he should be brought before the court by attachment, so that the court may determine whether he has any excuse for failure to obey the order." 157 Misc. at 801, 284 N.Y.S. at 659.

In *Sure Fire Fuel Corp.* v. *Martinez,* 75 Misc.2d 714, 348 N.Y.S. 2d 502 (Civ. Ct., N.Y. Co. 1973) Judge Gabel refused to punish a judgment debtor for contempt in his absence and directed the issuance of a bailable attachment under JUDICIARY LAW Section 757(2). The court explained:

> "From the very nature of the severity of the punishment, however this powerful weapon should not be deployed on such a free and easy basis that contempt is determined by default or on a *pro forma* affidavit . . .
>
> The fact that the judgment debtor has failed to comply with the order does not of itself render the defendant guilty of contumacious conduct calculated to defeat, impair, impede and prejudice the rights and remedies of the plaintiff, as stated in the moving papers. In fact, a statement to that effect by plaintiff's attorney is unsupported by evidence of any kind. 'If a debtor is directed to pay installments out of his income and he has no income during certain periods he does not disobey the mandate by failing to make payments on such occasions and cannot be punished for contempt . . .' " 75 Misc.2d at 715-716, 348 N.Y.S.2d at 505-506.[118]

[118] The "better practice" and its rationale is described in *Uni-Serv Corp.* v. *Linker, supra,* note 104 as follows:

> "Contempt should not . . . be determined by default or on a *pro forma* affidavit . . . It is the better procedure to bring

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In *Uni-Serv Corporation* v. *Batyr,* 62 Misc.2d 860, 311 N.Y.S.2d 456 (Civ. Ct., N.Y. Co., 1970) the court recognized the practice in New York City Civil Court of issuing a bailable attachment under JUDICIARY LAW Section 757(2) before punishing a judgment debtor for contempt. However, the court in the circumstances refused to issue the writ of attachment."[119] The court recited a number of appearances by the debtor and stipulations of adjournment and explained:

> "[t]he court records indicate that the debtor did not appear on that date; and I am now asked to sign an attachment order directing the Sheriff to produce Mrs. Batyr by virtue of the 'contempt' (JUDICIARY LAW Section 757).
>
> This I decline to do. The issuance of such an order is discretionary (JUDICIARY LAW Section 757); and it

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> the debtor 'before the court by attachment, so that the court may be able to determine whether he has any excuse for failure to obey the order' (*Diamond & Fraser Iron Works* v. *DiTullio,* 157 Misc. 800, 801). The plaintiff's attorney's conclusory statement contained in his affidavit in support of this motion that (the defendant is in a position to make regular payments) is hardly a substitute for proof. Contempt has not been proved . . .
>
> It should be observed that the plaintiff is not without remedy. A new subpoena may be served and the debtor's assets or income ascertained (CPLR 5223; 5224, subds. [a] and [f]). Generally, if this or any other debtor ignores a subpoena, let him be brought before the court and have the alleged contempt adjudicated. A fine may be imposed in reduction of the obligation or otherwise (Judiciary Law, § 773) and the debtor, on pain of further punishment, may be directed to submit to an examination—which is all the plaintiff was entitled to in the first instance. If an installment payment order is then warranted, an appropriate motion may be made and proper proof taken. The safeguards of the statute are not to be eroded by stipulations designed to use the contempt power for the collection of judgments." 62 Misc. 2d 865-866, 348 N.Y.S.2d at 730-731.

[119] For discussion of contempt as used against debtors failing to pay under installment payment orders see note 104 *supra.*

would be the grossest abuse of discretion for me, faced with this pattern of harassment . . . to issue this attachment." 62 Misc.2d at 861, 311 N.Y.S.2d at 457.[120]

The Civil Court for the City of New York in the cases cited has required as a matter of practice one step which was not employed in the Dutchess County procedures challenged in this case and which the appellees and the Consumer Protection Board believe is constitutionally necessary; namely, the bringing of the accused before the court before committing him to jail.

The Civil Court did not reach this conclusion by statutory interpretation or by declaring the statute unconstitutional. JUDICIARY LAW Section 757 offers the court a choice between the order to show cause procedure in Section 757(1) and the warrant of attachment procedure in Section 757(2). Indeed as the Attorney General points out on page 23 of his brief, the court may first employ Section 757(1) and then Section 757(2). The Civil Court as a matter of the "better practice" (*Sure Fire Fuel Corp.* v. *Martinez, supra* note 104 at 506) has followed the procedure recommended by the Attorney General in his brief. Under New York law, the court could have chosen not to do this. Unlike the FAMILY COURT ACT, JUDICIARY LAW Section 757 offers the courts a choice of procedure. The procedure followed in Dutchess County in the challenged cases is unambiguously permitted by the statute. The District Court in *Vail* v. *Quinlan* correctly concluded that the statute is unambiguous.

The procedure in the New York City Civil Court is not unobjectionable on constitutional grounds. The appellees

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[120] *Uni-Serv Corp.* v. *Batyr, supra* note 104, deals with an information subpoena to appear, testify and produce documentary evidence. *Uni-Serv Corp.* v. *Linker, supra* note 104, deals with an installment payment order.

and the Consumer Protection Board contend that the judgment debtor should be given clear notice of potential imprisonment and if indigent should be assigned counsel. These elements are missing in the City Court procedure[121] and in the cases just discussed.

(iii) The Contempt Practice Challenged In This Case And Used In Other Parts Of The State Lacks Elements Which Are Constitutionally Required

Richard Alderman's *Imprisonment for Debt, The Contempt Power and The Effectiveness of Notice Provisions in The State of New York*, 24 SYRACUSE L. REV. 1217 (1973) contains an empirical study of the use of information subpoenas[122] and installment payment orders followed by

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[121] The practice portrayed by Sherwin in his handbook for New York collection attorneys, *supra* note 14 at 59-63 substantially resembles the City Court practice. Sherwin contemplates the use of the warrant of attachment to bring the debtor before the court. *Id.* 59. Despite this practice, there is nevertheless no requirement of personal service *Id.*, apparently a genuine possibility of imprisonment *Id.* and an opportunity for the creditor to obtain payment of the debt—possibly with the help of the bailable attachment—rather than information where the debtor has failed to answer an information subpoena. *Id.* The practice as outlined by Sherwin does not include assignment of counsel. The importance of the procedure is emphasized by the substantial number of forms provided by Sherwin which are relevant to this practice—approximately a quarter of the whole number of forms.

[122] For an illustration of use of the subpoena to appear to be examined for assets as a threat in the extra-legal pre-suit collection process see P. SCHRAG, CASES AND MATERIALS ON CONSUMER PROTECTION 1022 (2d Ed. reprint from Cooper, Berger, Dodyk, Paulsen, Schrag and Sovern, Cases and Materials on Law, and Poverty) where affidavits used in *Grant* v. *Compact Electra Corp.*, Index No. 49060/70 (S. Ct. N.Y. Co., N.Y.) are presented. Exhibit A-3 to Affidavit of Roy Morrison contains excerpts from pre-suit collection documents which read in part as follows:

"If you are sued on a debt and the court gives judgment against you, you are in serious trouble . . .

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fines and imprisonment for contempt during the post-judgment collection process in New York's Onondaga County.

The contempt procedure described by Alderman is based upon JUDICIARY LAW Section 757(1) under which a court may issue an order directing the accused to show cause why he should not be punished for contempt. 24 SYRACUSE L. REV. 1217, *supra* at 1222. Alderman states:

> ". . . the practice generally followed in the case of nondisclosure is the issuance of a show cause order and a subsequent hearing to determine the guilt or innocence of the alleged contemnor.
>
> In the event that the judgment debtor fails to appear at the show cause hearing he will be adjudged in contempt in absentia, the burden of proof having shifted to the debtor to show cause why he should not be held in contempt. After return of the show cause order and a determination that the judgment debtor is in contempt, the debtor may be fined an amount sufficient to indemnify the aggrieved creditor, or to pay him an amount not exceeding costs plus $250. Immediately thereafter a commitment order will issue, directing that the judgment debtor stand committed to the local jail until such time as the fine is paid. The judgment debtor may then remain incarcerated, without the assignment of counsel or judicial review, for up to 90 days. The fine, when paid, is remitted directly by the court to the judgment creditor and is applied to the debt." *Id.* at 1223-1224 (footnotes omitted).

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> An officer of the court . . . may be instructed to bring you and your family into court and force you and them to tell under oath what property you own. This will be expensive and embarrassing to you.

Under the procedure as described by Alderman, the debtor may be imprisoned and remain in prison for 90 days without ever being physically present before the court.[123] Debtors so imprisoned are not informed of their right to counsel and indigent debtors accused of contempt are not assigned counsel.

Alderman describes the flow of cases in Onondaga County Court as follows:

> [f]or the two-month period under consideration a total of 467 cases appeared on the calendar of Onondaga County Court, Motion Term, all but 12 of which

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[123] New York's Installment Payment order is also enforceable by the contempt process. Alderman states:

> "In parallel fashion, New York's installment payment order is also enforceable by the contempt power. The installment payment order, originally designed to replace the remedy of income execution (wage garnishment), is a court order directing the judgment debtor to make periodic payments to the judgment creditor. The amount of the payment is to be determined by the court after notice is given to the judgment debtor and a hearing is held. In deciding upon the amount of the payments the court is directed by law to consider the reasonable needs of the judgment debtor and his dependents. Like contempt proceedings, the hearing for the installment payment order is upon an order to show cause. Field observations in Onondaga County disclosed that when the judgment debtor fails to appear, an installment payment order generally issues in the amount requested by the judgment creditor. If subsequent to the issuance of an installment payment order the judgment debtor fails to make payments to the creditor as directed, the judgment creditor may apply to the court to have the judgment debtor held in contempt. The procedures followed in arriving at a finding of contempt will be the same as those discussed above with regard to disclosure. The amount of the fine, however, will be limited to the amount of arrearage that the judgment debtor has incurred on the installment payment order. The one factor common to the employment of the contempt power in both the case of an installment payment order and an information subpoena is that the debtor's failure to appear at the show cause hearing results automatically in a finding of contempt, and a fine and commitment order will issue accordingly." *Imprisonment for Debt, supra* note 106 at 1225-1226.

were concerned with contempt proceedings and the enforcement of money judgments. A profile of the study population (see Table 1 below) reveals that 296 of the cases (63.4 percent) were instituted to enforce, through the contempt power, debtor compliance with information subpoenas. In 93 of these disclosure cases the debtor was being fined for a repetitive failure to comply with the judgment creditor's requests for disclosure. Forty-seven cases (10.6 percent of the total) were instituted either to obtain or to enforce an installment payment order. In only 32 cases (6.9 percent) did the judgment debtor appear at the show cause hearing. In all cases in which the judment debtor appeared the court granted either an adjournment or discontinuance." 24 SYRACUSE L. REV. at 1229 (footnotes omitted).[124]

The contempt procedures employed in Dutchess County led to the case before this Court. Appellees Vail, Ward, McNair, Hurry, Nameth, Humes, and Harvard were fined for contempt of court for failure to appear in response to subpoenas issued by attorneys for their creditors.[125] The

[124] Alderman conducted a follow-up study in October of 1972 designed to insure the validity of his findings. Alderman concluded that:

"The pattern observed in the initial two month study remained stable.

From the original study population of 467 a smaller working sample of 108 cases was selected. This sample closely correlated with the total population. In 70 of the cases (64.8 percent) the judgment debtor was accused of failing to comply with the judgment creditor's requests for disclosure. Of these, approximately one quarter were for repetitive failures. Twenty-five cases (23.1 percent of the smaller working sample) involved installment payment orders." *Imprisonment for Debt, supra* note 106 at 1229.

[125] Compare *La Prease* v. *Raymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970) wherein a replevin statute which permitted subpoenas deemed orders of the court to be issued by attorneys for their creditors was struck down by the court as violative of due process and the 4th Amendment.

subpoenas were issued following default judgments to compel disclosure of assets. The creditors instituted civil contempt proceedings using the order to show cause procedure authorized by JUDICIARY LAW Section 757(1). The orders directed each appellee to show cause "why he should not be punished as for contempt for violation of and non-compliance with the said subpoena." The orders did not warn the debtor concerning potential fine or imprisonment. The appellees who did not appear in response to the order to show cause were fined in their absence. Upon failure to pay the fine, the court issued an *ex parte* commitment order. The court did not at this stage employ the warrant of attachment procedure made available by JUDICIARY LAW Section 757(2). Appellees Vail, McNair, Nameth, Humes and Harvard were arrested and imprisoned. Appellees Nameth and Humes were arrested and imprisoned on February 10, 1975, although a Temporary Restraining Order had been issued on January 8, 1975, to prevent their arrest. They were released when counsel called the restraining order to the attention of the state court. The other appellees were released upon payment of the fines.

The procedure followed in these cases is substantially the same as that described by Alderman. The court followed the procedure authorized by JUDICIARY LAW Section 757(1). The appellees were committed to jail without ever being physically present before the court. Counsel was not assigned although appellees Vail, Ward, Humes, and Harvard as a matter of public record were recipients of various public assistance grants and therefore presumptively indigent.

Appellee Rabasco was subjected to a civil contempt procedure instituted by his wife, Gladys Rabasco, to enforce a support order. The procedure followed in his case was substantially similar to that declared unconstitutional

in *Darbonne* v. *Darbonne, supra,*[126] and before that followed in Kings County Supreme Court. Appellee Rabasco, however, did appear at the show cause hearing and requested assignment of counsel on the ground that he did not have sufficient funds to retain a lawyer. His request was denied.

C. Many Factors Leading To Default Judgments Also Lead To Imprisonment During The Supplementary Proceedings Phase

A collection attorney in New York may combine one of the contempt procedures just outlined with use of such collection and information gathering devices as the installment payment order and the information subpoena or the subpoena to appear for examination as to assets. It is possible in New York to use this combination as a means for collecting a judgment under the threat of imprisonment or by actually imprisoning the debtor until the judgment is paid.[127]

A collection attorney's ability to use this combination efficiently[128] to achieve his goal of collecting judgments is

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[126] For discussion of *Darbonne* v. *Darbonne,* see footnote 19 and accompanying text, *supra.*

[127] See SHERWIN, *supra* note 14 at 59-63; NEEDHAM AND POLLOCK, *supra* note 2 at 188, 89; *Imprisonment for Debt, supra* note 6-16 at 1224; See also Donnelly and Donnelly, *1974 Annual Survey of N.Y. Commercial Law,* 26 SYRACUSE L. REV. 233, 273-4 (1975); Donnelly and Donnelly, *1972 Annual Survey of N.Y. Commercial Law,* 24 SYRACUSE L. REV. 325, 350 (1973); Donnelly and Donnelly, *1971 Annual Survey of N.Y. Commercial Law,* 23 SYRACUSE L. REV. 373, 396-97 (1972).

[128] In regard to the collection attorneys' need for efficiency see A. RUBIN, FUNDAMENTALS OF THE COMMERCIAL PRACTICE, 72-3 (1965); 12 AM. JUR. TRIALS, 1973; Stamm, *A Sweeter Road to Profits in the Commercial Practice,* 70 *Com. L. J.* 199, 199 (1965) and the quotations from these works, *supra* note 113.

Rubin notes:

"Fundamentally, the collection process is an attempt by the commercial attorney to find the particular debtor's 'threshold

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enhanced by the same factors which lead to default judgments in consumer credit actions:

(i) Factors related to the papers served

Among the factors common to default judgments in consumer credit actions and to the use of contempt as a means for collecting a judgment are difficulties with the service of process or papers and failure by the debtor to understand the papers served because of inability to read, inability to read English,[129] or lack of comprehension of legal

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of pain' in order to force the debtor to come forward voluntarily to pay the claim . . .

Some jurisdictions permit an examination of the debtor under oath in aid of execution. Such an examination may be extremely helpful and frequently of itself may touch a 'threshold of pain.'" A. RUBIN, FUNDAMENTALS OF THE COMMERCIAL PRACTICE 90-91 (1965).

In 12 AM. JUR. TRIALS 250-251 it is stated:

"Sec. 46. Contempt

While imprisonment for debt is rarely allowed imprisonment for contempt of court is an accepted punishment. Failure to comply with an order to appear for examination in a supplementary proceeding may be punished as a contempt of court . . .

The secret of successful collection is to make the payment of the debt less onerous to the debtor than some alternative. Few debtors conceal assets, or refuse to pay when they have the ability to do so, if imprisonment is the only alternative." *Id.*

In 12 AM. JUR. TRIALS at 252 it is stated:

"There are statutory provisions in some jurisdictions that authorize courts to order the judgment debtor to make periodic payments to the creditor in reduction of a judgment . . .

A very important aspect of required installment payments is the psychological effect on the debtor. If he fails to make the payments after a court order to do so he may be adjudged guilty of contempt (see Sec. 46, *supra*)." *Id.*

[129] See CONSUMERS IN TROUBLE, *supra* note 2 at 196. Although New York City requires that summonses arising out of consumer credit transactions must include a Spanish translation, N.Y. CITY

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language.[120] Alderman found that the contempt procedures and papers he examined were "ineffective to inform the low income debtor either of the reason for the punishment or of what steps he could take to alleviate it." 24 SYRACUSE L. REV. at 1238. Alderman elaborated:

> "The basic weakness of the show cause hearing appeared similar to those affecting adjudication on the merits: the lack of sufficient protections to insure proper service, and the complicated nature of the document served. Only 24 of the subjects stated they were served with a show cause order. If effectiveness of service is to be measured, this number must be further reduced, since of the group who admitted being served, only 18 expressed knowledge sufficient to con-

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CIV. CT. ACT Sec. 401(d) (McKinney Supp. 1973), "the translation is apparently as legalistic as the English original, and the typical Spanish-speaking consumer would probably have difficulty understanding it." Note, *Due Process Denied: Consumer Default Judgments in New York City*, 10 COLUM. J. OF L. SOC. SCI. 370, 385 n. 60 (1974). There are Spanish speaking residents of New York outside New York City. There are other linguistic groups in New York City and settled elsewhere in the state. There is a large Italian speaking population upstate but particularly in Utica.

[120] See CONSUMERS IN TROUBLE, *supra* note 2 at 207-210. Caplovitz compared the wording of the summons in Chicago, Detroit and New York and commented that greater failure to respond to the summons in New York could be related to its language:

> "A comparison of the summonses used in Chicago, Detroit, and New York calls attention to yet another possible reason for the failure of New York debtors to respond. In both language and typeface, the New York summons is much more difficult to understand than those used in Chicago and Detroit. In the latter cities, key parts of the summons appear in large boldface type, set off from other parts, whereas in New York, the essential points are lost in legal verbiage." *Id.* at 207.

The Caplovitz study revealed that whereas only 4 percent of those debtors who were served in New York appeared in court, the percentage was substantially higher in Chicago, 36 percent, and Detroit 34 percent. *Id.* at 204.

> vince the interviewer that they understood what the order meant. As was expected, the subjects had a great deal of difficulty understanding the lengthy document. The failure of the present system properly to inform the judgment debtor of his legal rights is even more significant in light of the fact that 37 of the subjects appeared to have what the study team believed to be a valid defense, and that had they appeared, they might well have escaped punishment. (Few, if any, of the persons who appear are ever fined.)" *Id.* at 1238.

Of the 40 persons fined for contempt who were interviewed in the Alderman study, 14 did not know they were being sued, 18 did not know that a judgment had been entered against them, and 17 denied receiving an information subpoena in the mail. *Id.* at 1253. Alderman notes that among the reasons for "confusion on the part of the debtor is the overwhelming amount of paper which he receives and the difficulty encountered by the layman in understanding legal documents." *Id.* at 1234. He adds: "When shown a copy of a summons, the subject may have recalled receiving it; however, the fact that he did not know he had been sued demonstrates the failure of the present system to provide meaningful notice to the debtor." *Id.* at 1234.[121]

(ii) Confusion Concerning Proper Response To Papers Served

Many debtors, particularly those who are indigent, find legal procedure confusing. David Caplovitz found that inappropriate responses to the summons and complaint were a factor leading to default judgments in consumer credit actions.[122] Alderman found a similar pattern in debtor

[121] Compare CONSUMERS IN TROUBLE, *supra* note 2 at 191-224; *Due Process Denied*, *supra* note 48 at 382-388, 413.

[122] CONSUMERS IN TROUBLE, *supra* note 2 at 204, 215-16, 222-224.

responses to the variety of papers served during the post-judgment collection process:

> "Many subjects had specific excuses for their defaults other than ignorance. One of the most common of these was that they had contacted the office of the creditor's attorney and believed that he had 'taken care' of everything. Subjects repeatedly stated that they were arranging for payment with the creditor's attorney, or that they had telephoned his office and were told not to appear in court. In one case, the subject appeared in court on the scheduled date, but the creditor's attorney failed to appear. This judgment debtor then contacted the creditor's attorney to ask about the adjournment date and was informed that as long as he paid a set amount each week, there was nothing to worry about. Two weeks later, in spite of payment, the debtor was adjudged in contempt, fined, and ordered committed to jail." 24 SYRACUSE L. REV. at 1238.

The pattern of harassment through multiple adjournments observed by the Civil Court for the City of New York in *Uni-Serv Corporation* v. *Batyr, supra,* and described above[133] resembles, in some respects, the instance reported by Alderman. The circumstances in appellee Ward's case described at pages 54-56 of the appellees' brief again present a similar pattern. Ward appeared in court in response to the subpoena directing him to appear to be examined for assets. The attorney for the creditor was not present. Ward went to the attorney's office and informed him that he would answer the questions in court but not in the attorney's office. The contempt process was then initiated. Later, Ward arranged to pay $10 a week to satisfy the judgment, made payments, but ceased pay-

[133] For discussion of *Batyr* see footnote 119 and accompanying text, *supra.*

ing upon losing his job. The contempt process was then pressed.[134]

Alderman notes that confusion concerning the appropriate method for responding to a subpoena or an order to show cause was but one example of a general pattern of ignorance on the part of the judgment debtor.[135]

> "While several of the subjects had stories similar to those above, the prevailing causes of the debtor's al-

[134] Compare CONSUMERS IN TROUBLE, *supra* note 2 at 204:

> "By far the most common reason for not appearing in court in each jurisdiction (ranging from one third of the Chicago cases to one fifth of the New York cases) is that the debtor, presumably stimulated by the initiation of the lawsuit, has arranged for some kind of settlement with the creditor's attorney. These debtors are of the impression, often mistaken, that the court action has been discontinued."

[135] Compare CONSUMERS IN TROUBLE, *supra* note 2 at 205 where Caplovitz sets forth the following table:

Table 11.6 / Reasons for Not Appearing in Court in Response to the Summons, by City (percent)

	Chicago	*Detroit*	*New York*
Tried to settle and thought court action was discontinued	33	28	21
Advised not to go to court by plaintiff's attorney or own attorney	13	13	9
Thought debt settled and did not owe more money	5	6	10
Unable to go; sick or could not afford loss of day's pay	16	8	12
No particular reason; forgot	10	14	11
Couldn't pay; no defense	7	14	8
Received summons too late to go to court	4	3	3
Did not know that he was supposed to go to court	3 } 4	6 } 7	15 } 19
Afraid to go to court	1 }	1 }	4 }
Total percent	92	93	93

[a] The percentages do not total 100 because we have omitted a miscellaneous category as well as the "no answer" cases.

leged obstinance appeared to be lack of intelligence and fear of the legal process involved. Few, if any, of the persons interviewed understood why they had been fined, and none stated that they knew how to prevent it. Most of the subjects believed that the fine was levied to force payment of the debt and that the sheriff was there to collect. Even welfare recipients, who could not legally be forced to pay any part of the debt while receiving public assistance, paid the sheriff rather than go to jail, often borrowing money in order to pay the sheriff and thereby perpetuating their indebtedness." 24 SYRACUSE L. REV. at 1238-1239.

(iii) The Initial Failure To Obtain Representation And Respond To The Summons And Complaint

The initial failure to obtain representation[136] and respond to the summons and complaint sets a pattern which continues from the initiation of the action to default judgment and, in some cases, to the fine or commitment to jail for contempt of court. The problem of imprisonment for debt must be seen as part of a larger social problem vividly illustrated by the overwhelming percentage of default judgments in consumer credit actions.

As stated above, the vast majority of consumer credit actions in New York and throughout the country end in

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[136] Compare CONSUMERS IN TROUBLE, *supra* note 2 at 222-224. Caplovitz explains:

> Closely related to the failure of debtors to have their day in court and their legal rights protected is the irony that law suits against consumers generally involve sums of money that are smaller than the amounts the debtor would have to pay a lawyer to protect his rights. CONSUMERS IN TROUBLE, *supra* note 2 at 222.

default judgments.[137] In the case now before the Court, appellees Vail, Ward, McNair, Hurry, Nameth, Humes and Harvard had default judgments taken against them.

A debtor who is unrepresented by counsel at the outset of a consumer credit action is likely to make mistakes after judgment which could form the basis for fining him for contempt of court and committing him to jail. The appointment of counsel by the state when commitment of an indigent to jail appears as a plain possibility would enable the judgment debtor to avoid some of these mistakes.[138]

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[137] *Staff Report, supra* note 23 at 116. Caplovitz indicates that over 90% of New York City consumer actions result in default judgments. CONSUMERS IN TROUBLE, *supra* note 2 at 221. One study of 23 New York City collection attorneys revealed that in one 3-month period, 15 of the 23 obtained default judgments in 100 percent of the consumer lawsuits they initiated. Another attorney ". . . estimated that he initiated 7,000 lawsuits annually of which 90% resulted in default." *Staff Report, supra* note 23 at 164-165. A study of two New York City retail furniture stores revealed that in 1971 they alone accounted for 831 default judgments. Note, *Due Process Denied, supra* note 48 at 371 n. 11. Alderman's study of imprisonment for debt in Onondaga County revealed that most of the judgments won by creditors in the cases studied were by default. *Imprisonment for Debt, supra* note 49 at 1225.

[138] See *Argersinger* v. *Hamlin*, 407 U.S. 25 at 33 where the Court stated:

> "The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more."

IV. Use Of The Contempt Process In The Supplementary Proceedings Stage In New York Domestic Relations And Consumer Credit Cases Has Undesirable Consequences.

The outline of the collection process beginning with presuit extra legal collection methods, followed by the initiation of legal action by summons and complaint and continuing through the supplementary proceedings stage which includes in some instances the use of contempt and imprisonment for debt has revealed a series of social problems. The social problems giving rise to default judgments in consumer credit actions are not separable from those leading to fines and imprisonment for contempt of court during the supplementary proceedings process. One can locate, however, some distinct undesirable consequences of the use of contempt at this latter stage:

A. Use of the contempt procedure coupled with the information subpoena or the subpoena to appear for examination as to assets allows the collection of the debt itself rather than the acquisition of information. The contempt power of the court by this means is made part of the collection process.[139]

B. Use of the contempt procedure coupled with the installment payment order, the information subpoena or the subpoena to appear for examination as to assets allows

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[139] See R. GOLDFARB, THE CONTEMPT POWER, 292-93 (1963) where it is stated:

> "[c]ontempt should not be generally extended to cover, as it has been, situations where the only aim is to perfect a private litigated right. To do so results in a theoretical bastardization of the true contempt and often an unfair misapplication of penal powers. Only when all methods of ordinary civil execution have failed, and an individual's recalcitrance has gone to the point of positive interference with government, should the broad and powerful contempt sanction be applied."

collection of the debt in a lump sum[140] rather than by periodic payments as under garnishment (income execution) or the installment payment order absent a fine for contempt. When used against indigent or near indigent debtors this process will impose a heavy burden.[141]

C. Use of the contempt procedure coupled with the information subpoena or the subpoena to appear for examination as to assets allows collection from indigents and from those in receipt of salaries less than the floor found in the New York income execution provisions[142] or the Federal Anti-Garnishment Act.[143] Collection has been successfully attempted by this process against those in receipt of public assistance.[144]

V. Use Of The Contempt Process In the Post-Judgment Collection Stage In New York Domestic Relations And Consumer Credit Cases Violates The Due Process Clause Of The Fourteenth Amendment

The Consumer Protection Board relies upon the arguments made in appellees' brief to demonstrate that the contempt procedures followed in appellees' cases in state court were constitutionally deficient under the due process clause of the 14th Amendment. The Board should, however, repeat its contention that these procedures and the contempt procedures followed elsewhere in New York in

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[140] This might occur even where a bailable attachment under JUDICIARY LAW § 757(2) is employed as in the Civil Court for the City of New York.

[141] *See Imprisonment for Debt, supra* note 49 at 1239.

[142] N.Y. CPLR § 5231 (McKinney 1963).

[143] Federal Consumer Credit Protection Act, 15 U.S.C.A. §§ 1671-1677 (1974).

[144] See note 33, *supra*, and the facts of this case.

domestic relations and consumer credit actions with the exception of proceedings in Family Court under the FAMILY COURT ACT are unconstitutional because:

A. The subpoenas employed and the order to show cause why the accused should not be punished for contempt do not provide notice of the possibility of fine or imprisonment.[145]

B. The failure to use the warrant of attachment procedure found in JUDICIARY LAW Section 757(2) before the issuance of a commitment order denies a hearing at a crucial point in the proceedings.[146] The JUDICIARY LAW plainly permits the practice followed in appellees' cases in the state courts in Dutchess County and in most of the other courts discussed.[147] Debtors may be imprisoned under these procedures for 90 days without ever being physically present before the court.

C. Indigent debtors may be imprisoned by these procedures without being offered the assistance of assigned counsel.[148]

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[145] *Lynch* v. *Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).

[146] *Desmond* v. *Hachey*, 315 F. Supp. 328 (D. Me. 1970). The desirability of this procedure for the purpose of satisfying the due process clause is recognized by the Attorney General at page 23 of his brief.

[147] The Civil Court for the City of New York, however, employs the warrant of attachment at the appropriate point in its procedure.

[148] *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

VI. The Due Process Requirements Mandated By The Three-Judge Court Are Feasible. The Requirements Of Notice Of Potential Fine And Imprisonment, Physical Presence Of The Debtor Accused Of Contempt Of Court At A Hearing, And The Assignment Of Counsel Are Practicable To Implement.

It is feasible to cure the violations of the due process clause of the 14th Amendment just described: (*i*) By requiring subpoenas employed in the effort to discover assets and orders to show cause issued in contempt proceedings, to warn the debtor clearly of potential fine and imprisonment; (*ii*) by requiring the physical presence of a judgment debtor accused of contempt at a hearing before he is incarcerated; and (*iii*) by requiring assignment of counsel to indigent judgment debtors accused of contempt.

(i) Clear Notice

Creditors can easily modify their forms to provide subpoenaed judgment debtors with clear notice of the consequences of not responding to the subpoena. Such notice would afford the judgment debtor some opportunity for distinguishing between these subpoenas and the large number of other papers received in the collection process. Studies of legal process reveal that greater clarity would lead to a larger number of responses which would include responding by judgment debtors to information subpoenas or subpoenas to appear for examination as to assets.[149]

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[149] *See Consumers in Trouble, supra* note at 201-211.

A comparison of the summonses used in Chicago, Detroit, and New York calls attention to yet another possible reason for the failure of New York debtors to respond. In both language and typeface, the New York summons is much more difficult to understand than those used in Chicago and Detroit. In the latter

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(ii) Presence At A Hearing

The Attorney General recommends (appellant's brief p. 23) that in a contempt proceeding a court first issue an order to show cause under JUDICIARY LAW, Section

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cities, key parts of the summons appear in large boldface type, set off from other parts, whereas in New York, the essential points are lost in legal verbiage. Moreover, in both Chicago and Detroit, the time for responses is the same whether personal or substitute service was made and therefore there is no ambiguity as to when the debtor should respond. In contrast, the New York summons tries to explain the difference in response time according to method of service. *Id.*, at 207.

These differences are apparent when the actual language that appears on the summonses is examined. In all three cities, the summonses are headed by the name of the court in which they are issued, followed by the names and addresses of the plaintiff, defendant, and plaintiff's attorney, the date at which the summons was issued or served, and, in Chicago and Detroit, the signature of the court clerk. (This does not appear on the New York summons because service of summons is not a court responsibility in New York.) For present purposes, the critical parts of these summonses are their communications addressed to the defendants. In Chicago, the language of the summons differed according to whether the suit was an open one or one based on a confession-of-judgment contract. Since the Chicago sample was based exclusively on the confirmation-of-judgment book, the appropriate summons is the one served on debtors who had signed confession-of-judgment contracts. *Id.*, at 208.

The communications to the debtor-defendant in this summons are contained in but three sentences or parts, the first of which contains 91 words, the second, about personal service, 29 words, and the third, about substitute service, 67 words. (Actually the second and third constitute a single sentence.) The long first sentence contains three messages: first, it tells the debtor that he is being summoned to court; second, it tells him the address of the court; and third it tells him that if he fails to appear, he will be subjected to a default judgment for the "relief demanded in the complaint." Unlike the summonses in Chicago and Detroit, these vital messages all appear in the same lowercase typeface within a single sentence. It talks about "the time period provided by law as noted below," about the complaint "which is annexed hereto," and about "relief demanded in the complaint, together with the costs of this action." A summons so designed is hardly apt to

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757(1) and then if the Judgment Debtor does not appear, use the warrant of attachment under New York JUDICIARY LAW Section 757(2) to bring the debtor before the court. Use of the warrant of attachment in this manner would eliminate the instances where a judgment debtor is committed to jail for up to 90 days without ever being physically present at a hearing in court. It would conform the contempt process to the normal criminal law procedure which requires arraignment after an accused is apprehended.

The procedure recommended by the Attorney General is presently required in family court, FAMILY COURT ACT, Sections 453, 454.[150] This procedure is also employed in several courts of the Civil Court of the City of New York in contempt proceedings. *Sure Fire Fuel Corp.* v. *Martinez, supra.*[151]

Requiring a creditor's attorney who wants to imprison a judgment debtor to request the court to issue a warrant of attachment rather than a commitment order would not overburden public officials.[152] Requiring the sheriff or

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communicate with the typical debtor, who tends to be rather poorly educated; moreover, it falls far short of the clarity of the summonses in the other two cities. *Id.*, 209.

See also, Press Release, Citibank Public Affairs Department, July 16, 1976, indicating that consumers "are more apt to defend themselves in court if they receive a summons which includes a post card answer, a three-month experiment conducted jointly by Citibank and Justice Edward Thompson, Administrative Judge of the City of New York Civil Courts, has revealed." Also reported in *Use of Post-Card Reply Format Found to Cut Default Rate in Citibank Suits,* 174 N.Y.L.J. 1 (August 3, 1976).

[150] For discussion of procedure required by the Family Court see notes 114-115 and accompanying text, *supra.*

[151] For discussion of the procedure employed by the Civil Court of the City of New York, see notes 116-121 and accompanying text, *supra.*

[152] For the discussion of the revised Maine procedure, see note 108, *supra.*

deputy sheriff to bring the debtor to court under a warrant of attachment would not impose a significantly greater burden on him than bringing the debtor to jail under a commitment order.[153]

(iii) Assignment of Counsel

Assignment of counsel when a judgment debtor accused of contempt is indigent and unrepresented and when there is a reasonable likelihood that he will be imprisoned[154] or suffer other serious consequences should outweigh any burdens to the State.[155]

In similar circumstances, assignment of counsel is now required in Family Court by FAMILY COURT ACT, Section 262. See *Rudd* v. *Rudd, supra.*

The instances in which it would be proper to compel an indigent to pay or to testify concerning his assets by imprisoning him should be few in number because an indigent debtor, by definition, is unable to pay debts and does not possess any significant assets.

One potential procedure in contempt cases which would comply with the requirements of due process would be:

1. Issuance at the judgment creditor's request of an order to show cause under N.Y. JUDICIARY LAW Section 757(1);

2. If the judgment debtor does not appear in response to the order to show cause, issuance at the judgment creditor's request of a warrant of attachment under N.Y. JUDICIARY LAW Section 757(2);

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[153] A deputy sheriff who apprehends a debtor under a warrant of attachment would have no obligation to remain to testify at the hearings. In this respect, the burdens on the sheriff's office will differ significantly from the burden in a criminal arrest.

[154] *See Argersinger, supra,* at 37.

[155] *See Argersinger, supra,* at 47, 48 (Powell, J., concurring).

3. A requirement that the attorney for the judgment creditor at the time the warrant of attachment is requested, must specify whether he is seeking a fine and imprisonment; and

4. A requirement that counsel be assigned at the time the warrant of attachment is issued, if it appears reasonably probable that the debtor is indigent[156] and the creditor's attorney is seeking a fine or imprisonment.[157]

Use of this procedure would not preclude assignment of counsel when the judgment debtor is brought before the court by warrant of attachment if he then appears to be indigent. Nor would use of this procedure preclude a creditor's attorney from requesting fine or imprisonment if a judgment debtor brought before the court by warrant of attachment commits a new contempt in the court's presence by refusal to answer questions.[158]

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[156] Circumstances which create a presumption of indigency, such as receipt of public assistance, are often a matter of public record as in the case of appellees Vail, McNair, Nameth, Humes and Harvard. In other circumstances, the creditor's attorney will have information concerning indigency which he will furnish to the court if pressed or if it becomes routine practice to furnish such information. The creditor's attorney may know from examination of public records that the debtor owns no real property in the jurisdiction, that his automobile, if any, is subject to a security interest, and in some jurisdictions the amount of personal property taxed during the previous year. The creditor's attorney may have information concerning employment of the debtor including loss of a job. The attorney in appellee Ward's case knew of loss of employment.

In domestic relations cases, a spouse seeking enforcement of a support order may be well informed concerning the employment status of the debtor. Such information should be made available to the court before the warrant of attachment is issued.

[157] *See* discussion of bill passed by New York Legislature and subsequently withdrawn, *infra,* at n. 167, 165.

[158] The judge himself need not preside over the examination of a debtor willing to reply to questions concerning assets when brought to court under a warrant of attachment. The examination could be conducted either informally or, more formally by someone appointed for that purpose by the court. The person appointed could be the attorney for the creditor.

A procedure such as this would satisfy the concern for due process of law and feasibility expressed by the opinions in *Argersinger, supra.*[159] Whenever a judgment creditor is seeking to fine or imprison an indigent, there will probably be "complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel."[160] *Id.*, at 47 (Powell, J., concurring). The consequences of fine or imprisonment to an indigent will be "of sufficient magnitude not to be casually dismissed.[161] *Id.*, at 48 (Powell, J., concurring). The creditor will be represented by counsel. See *Argersinger, supra* at 49, 64 (Powell, J., concurring).

The number of cases in which a creditor's attorney will seek to fine or imprison an indigent under this procedure will probably be small. An indigent debtor who did not respond to the subpoena or order to show cause because of inability to read or understand the relevant papers or because of confusion concerning the court process will probably respond to questions when brought to court by warrant of attachment.[162] An indigent debtor who has not made payments under an installment payment order because of lack of funds or loss of employment will explain

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[159] *See Argersinger, supra,* at 42 (Burger, C.J., concurring), where it is stated: "[t]he judge can preserve the option of a jail sentence only by offering counsel to any defendant unable to retain counsel on his own. This need to predict will place a new load on courts already overburdened and already compelled to deal with far more cases in one day than is reasonable and proper. Yet, the prediction is not one beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer."

[160] These will include issues of intent, willfulness and state of mind. The elaborate background supplied in this brief will also be relevant to the judge's understanding of the problem. See also appellees' brief at —— n. ——.

[161] The consequences of a fine to an indigent debtor who, by definition will find it difficult to pay, will be either meaningless or will be backed by the threat of imprisonment.

[162] *See Imprisonment for Debt, supra* note 49, at 1229, 1235.

his difficulty when brought to court by warrant of attachment.[163] In such circumstances, it may be appropriate for the judgment creditor to seek a further order or agreement to pay; it will not be appropriate to fine or imprison the debtor.[164]

If the impact of a requirement that counsel be assigned in appropriate circumstances to indigents accused of contempt[165] is to reduce the number of such proceedings, that will be a desirable result. The contempt power of the courts should be used to protect the dignity and authority of the court and not to serve the convenience of private parties.[166]

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[163] *See, id.*, at 1229, 1235, 1237, 1239.

[164] For discussion of *Sure Fire*, and other City Court installment payment order cases, see notes 116-121 and accompanying text, *supra.*

[165] *See*, appellees' brief at 39, fn. 58, wherein there are listed the states in which an alleged civil contemnor must be brought before the court. *See also*, appellees' brief at 27, fn. 33, wherein there are listed the states in which an alleged civil contemnor must be assigned counsel.

[166] *See* R. Goldfarb, *The Contempt Power* at 292, 293 (Columbia University Press 1963). Goldfarb states:

> "[r]eference . . . to the historical nature of contempt power indicates that in any event, contempt of any kind or classification could historically only be a governmental power to be used essentially for governmental purposes, any private aspects notwithstanding. This is incontrovertible fact and history. If the purpose of civil contempt departs from this quality, it is contempt in name alone." *Id.*, at 58.

See also, Imprisonment for Debt, supra note 49, at 1243 n. 86, 1244 n. 88; and Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 272, 273 (1971).

VII. Abstention Is Inappropriate And Would Cause Confusion And Incalculable Delay In Resolving The Constitutional Deficiencies In The Challenged Contempt Process

The Consumer Protection Board relies upon the arguments made in appellees' brief to demonstrate that abstention is inappropriate in this case. The Board repeats in summary the appellees' position on abstention:

1. Comity and federalism permit federal courts to enjoin pending state court civil proceedings.

2. Comity and federalism demand intervention in court proceedings and the federal court should not defer to private litigants.

3. The consequences of non-intervention in civil proceedings will disrupt comity and federalism and impose an unwarranted limitation on the power of the federal courts.

4. Intervention is appropriate as the state court remedy is inadequate.

5. Intervention is appropriate where the statutes are flagrantly and patently unconstitutional.

6. Intervention is appropriate where civil contempt proceedings are utilized in bad faith.

7. The three judge court correctly decided to rule on the issues because the contempt statutes are clear and the state courts have already constructed the applicable statute.

A. The New York State Legislature And The Governor Are Both Waiting For This Case To Be Decided Before Acting On Any Legislative Modifications Of The Challenged Contempt Statutes

The New York State Legislature responded quickly to the Federal District Court Decision in this case.[167] The proposed legislation to remedy the constitutional defects in the contempt process passed both houses of the NYS Legislature;[168] however, the bill was recalled from the Governor on July 20, 1976, on account of this appeal.[169] The Counsel for the State of New York Office of Court Administration disclosed the putative reasoning:

> "The decision in *Vail* is presently before the United States Supreme Court, and we feel that it would be inappropriate for the Legislature to undertake a substantial revision of the New York contempt statutes until the Supreme Court has had an opportunity to express itself on the important issues involved. Approval of this bill might effectively moot the controversy raised in *Vail* and thereby deprive the Supreme Court of that opportunity . . .

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[167] The three judge court rendered its decision on January 7, 1976. A bill to cure the constitutional deficiencies in the contempt statutes was introduced in the New York State Senate on February 26, 1976.

[168] AN ACT to amend the judiciary law, the family court act and the domestic relations law, in relation to contempts generally and to repeal certain provisions thereof pertaining thereto. Assembly 10319, passed April 13, 1976, repassed June 29, 1976, Senate 21063, passed June 29, 1976. Key provisions of this bill are set forth in Appendix A.

[169] Letter of Mark E. Watkins, Esq., Counsel to the Assembly Committee on Judiciary, to Rosemary S. Pooler, Executive Director of the State Consumer Protection Board, September 22, 1976; Letter of Hon. John S. Thorp, Jr., Nassau County Court Judge and then-sponsor (as Assemblyman) of the bill, to Rosemary S. Pooler, September 23, 1976. See Appendix B.

> . . . We believe that the public interest will be best served by awaiting a definitive decision by the United States Supreme Court."[170]

Therefore, the Legislature and the Governor have deferred any legislative actions until this Court decides the constitutionality of the challenged contempt process.

The legislation passed by both houses of the State Legislature contained provisions for clear, vivid notice, for bringing the judgment debtor physically before the Court prior to commitment to jail, and for assigning counsel to the indigent debtor. Abstention on these issues will delay any action by the Legislature because of the absence of any definitive ruling.[171]

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[170] Letter of Michael R. Juviler, Esq., Counsel to the (N.Y.) Office of Court Administration to Judah Gribetz, Esq., Counsel to the Governor, July 20, 1976. See Appendix B.

[171] Compare the conclusion in respect to states generally of the Report of the National Commission of Consumer Finance (1972) at p. 32:

> "in several states debtors are still imprisoned for failure to pay their debts but the basis for incarceration is contempt of court for failing to obey the court's order to pay the debt.
>
> *No creditor should be permitted to cause or permit a warrant to issue against the person of the debtor with respect to a claim arising from a consumer credit transaction. In addition, no court should be able to hold a debtor in contempt for failure to pay a debt arising from a consumer credit transaction until the debtor has had an actual hearing to determine his ability to pay the debt.*
>
> As a matter of public policy, if imprisonment for debt still exists in any form, the Commission recommends its abolition. However, if after final judgment, and after notice and actual hearing and any other necessary procedural safeguards, a court has reasonably determined that the debtor has refused to pay a court-ordered sum when he has capacity to do so, the court should be able to initiate contempt proceedings."

B. Two State Agencies, The New York State Consumer Protection Board And The New York State Department of Law, Taking Opposite Positions In This Case Does Not Warrant Abstention

The Attorney General of New York is representing the appellants herein and, the Board is informed,[172] defending the constitutionality of the contempt statutes pursuant to Section 71 of the New York Executive Law and his constitutional duty. The New York State Consumer Protection Board is cooperating with and assisting in this class action pursuant to Section 553(3)(c) of the New York State Executive Law. The agencies are performing separate functions to facilitate full deliberation of the issues in this case and do not represent different interpretations of state law but, instead, different interpretations of the Constitution.

Conclusion

The New York State Consumer Protection Board, as Amicus, urges that the judgment of the District Court be affirmed on the ground that the challenged contempt process is in violation of the due process clause of the Fourteenth Amendment.

Respectfully submitted,

CARL G. DWORKIN, Esq.
HAROLD I. ABRAMSON, Esq.
Attorneys for the New York State Consumer Protection Board[173]

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[172] In a letter received on September 29, 1976, First Assistant Attorney General Samuel A. Hirshowitz so stated to the Board.

[173] The New York State Consumer Protection Board would like to acknowledge the invaluable and substantial assistance in preparing this brief provided by Professor Samuel J. M. Donnelly of the Syracuse University College of Law and the assistance provided by Michele F. Febie, third-year student at the Syracuse University College of Law.

Appendix A

AN ACT

to amend the judiciary law, the family court act and the domestic relations law, in relation to contempts generally and to repeal certain provisions thereof pertaining thereto

. . .

§ 756. Application to punish for contempt; procedure. An application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense, or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. The application shall be noticed, heard and determined in accordance with the procedure for a motion on notice in an action in such court, provided, however, that, except as provided in section fifty-two hundred fifty of the civil practice law and rules or unless otherwise ordered by the court, the moving papers shall be served no less than ten and no more than thirty days before the time at which the application is noticed to be heard. The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:

WARNING:
YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT . . .

§ 770. Final order directing punishment; exception. Upon the return of an application to punish for contempt, or upon a hearing held upon a warrant of commitment issued pursuant to section seven hundred seventy-two or seven hundred seventy-three, the court shall inform the offender that he has the right to the assistance of counsel, and when it appears that the offender is financially unable to obtain counsel, the court may in its discretion assign counsel to represent him. . . .

Where an application is made to punish an offender for an offense committed with respect to an enforcement procedure under the civil practice law and rules, if the offender appear and comply and satisfy the court or a judge before whom the application shall be pending that he has at the time no means or property or income which could be levied upon pursuant to an execution issued in such an enforcement procedure, the court or judge shall deny the application to punish the offender without prejudice to the applicant's rights and without prejudice to a renewal of the application upon notice and after proof that the financial condition of the offender has changed. . . .

Except as hereinafter provided, the offender may be committed upon a certified copy of the order so made, without further process. Where the commitment is ordered to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules or pursuant to section two hundred forty-five of the domestic relations law, and the defendant has not appeared upon the return of the application, the final order directing punishment and commitment of the offender shall include a provision granting him leave to purge himself of the contempt within ten days after personal service of the order by performance of the act or duty the omission of which constitutes the misconduct for which he is to be punished, and the act or duty to be performed shall be specified in the order. Upon a certified copy of the order, together with proof by affidavit that more than ten days

have elapsed since personal service thereof upon the offender, and that the act or duty specified has not been performed, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for such further disposition as the court in its discretion shall direct. . . .

If a fine is imposed to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules or pursuant to section two hundred forty-five of the domestic relations law, and it has not been shown that such an actual loss or injury has been caused and the defendant has not appeared upon the return of the application, the order imposing fine, if any, shall include a provision granting the offender leave to purge himself of the contempt within ten days after personal service of the order by appearing and satisfying the court that he is unable to pay the fine or, in the discretion of the court, by giving an undertaking in a sum to be fixed by the court conditioned upon payment of the fine plus costs and expenses and his appearance and performance of the act or duty, the omission of which constitutes the misconduct for which he is to be punished. The order may also include a provision committing the offender to prison until the fine plus costs and expenses are paid, or until he is discharged according to law. Upon a certified copy of the order imposing fine, together with proof by affidavit that more than ten days have elapsed since personal service thereof upon the offender, and that the fine plus costs and expenses has not been paid, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for

such other disposition as the court in its discretion shall direct. . . .

3. The respondent shall not be committed to jail pursuant to this section unless the court makes an order requiring such respondent to show cause at a time and place specified therein why he shall not be punished for contempt for his failure to obey any such lawful order. Such order to show cause shall be personally served upon the respondent and shall contain a clear statement of the purpose of the hearing and a warning that failure to appear may result in contempt of court and imprisonment in accord with the notice provision of section seven hundred fifty-six of the judiciary law.

§ 13. This act shall take effect immediately.

Appendix B

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

[EMBLEM]

ARTHUR J. COOPERMAN
27TH DISTRICT
QUEENS COUNTY

CHAIRMAN
COMMITTEE ON JUDICIARY

REPLY TO:

☐ DISTRICT OFFICE
80-32 164TH STREET
JAMAICA, NEW YORK 11432
297-4468

☐ ALBANY OFFICE
ROOM 844
LEGISLATIVE OFFICE BUILDING
ALBANY, NEW YORK 12248

September 22, 1976

Hon. Rosemary S. Pooler
Executive Department
State Consumer Protection Board
99 Washington Avenue
Albany, New York 12210

Dear Ms. Pooler:

In response to your inquiry of September 16, 1976, concerning A-10319, the bill was recalled at the request of the Governor's Counsel. The Counsel's office took the position that since an appeal of the *Vail* decision is now pending before the United States Supreme Court, any legislative action would be premature.

For your information, Mr. Thorp is now a Judge of the Nassau County Court and has been succeeded as Chairman of the Judiciary Committee by the Honorable Arthur J. Cooperman.

Very truly yours,

MARK E. WATKINS
Mark E. Watkins
Counsel

MEW/ls

CHAMBERS OF THE COUNTY COURT
COUNTY OF NASSAU
MINEOLA, N. Y. 11501

September 23, 1976

Ms. Rosemary S. Pooler
Executive Director
State Consumer Protection Board
99 Washington Avenue
Albany, N. Y. 12210

Dear Ms. Pooler:

I am writing in reply to your letter of September 16th relative to the bill which I sponsored, A10319, which reforms the procedures for the civil punishment of contempt.

This bill was recalled from the Governor at the request of the office of his Counsel. It is my recollection that they believed the legislation was premature in view of pending appeals in the cases to which you refer.

Since I am no longer a Member of the Assembly and you might require further information, I would respectfully refer you to Mark Watkins who is a member of the Assembly Central Staff and who was the primary drafter of this legislation.

Sincerely,

JOHN S. THORP, JR.
JOHN S. THORP, JR.
COUNTY COURT JUDGE

JST:eb

Appendix C

STATE OF NEW YORK
OFFICE OF COURT ADMINISTRATION
270 Broadway
New York, New York 10007

(Emblem)

RICHARD J. BARTLETT
State Administrative Judge

MICHAEL R. JUVILER
Counsel

July 20, 1976

Honorable Judah Gribetz
Counsel to the Governer
Executive Chamber
The Capitol
Albany, New York 12224

Re: A. 10319

Dear Mr. Gribetz:

This will acknowledge receipt of your request for comment on the above-designated legislation.

This bill would repeal and replace numerous sections of the Judiciary Law and Domestic Relations Law, in relation to procedures for the imposition of punishment for civil contempts of court. It is designed to conform with due process standards announced by a three-judge constitutional court in the case of *Vail* v. *Quinlan* (N.Y.L.J., Jan. 16, 1976, p. 1, col. 6 [S.D., N.Y.]).

The Office of Court Administration takes no position on the merits of the bill, but recommends disapproval.

The decision in *Vail* is presently before the United States Supreme Court, and we feel that it would be inappropriate for the Legislature to undertake a substantial revision of the New York contempt statutes until the Supreme Court

has had an opportunity to express itself on the important issues involved. Approval of this bill might effectively moot the controversy raised in *Vail* and thereby deprive the Supreme Court of that opportunity.

Disapproval of this measure will not adversely affect court administration. The *Vail* decision has been stayed pending its review by the Supreme Court. Consequently, the statutes to be repealed by this bill are still in effect and we perceive no need for interim legislation. We believe that the public interest will be best served by awaiting a definitive decision by the United States Supreme Court.

Very truly yours,

MICHAEL R. JUVILER
Michael R. Juviler

MRJ/FM/dbm